

(19,469.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 97.

FRANK COLE BROWN, PLAINTIFF IN ERROR,

*vs.*

CHARLES DUNCAN GURNEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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No. 4445.

In the Supreme Court of the State of Colorado.

Pleas before the honorable the supreme court of the State of Colorado, sitting at Denver, in said State, at a term thereof begun and held at the capitol building, in said city, on the second Monday of September, A. D. 1901, and of the Independence of the United States the one hundred and twenty-fifth.

Present: Hon. John Campbell, chief justice, Hon. William H. Gabbert, Hon. Robert W. Steele, justices, Hon. Chas. C. Post, Esq., attorney general, Felix A. Richardson, Esq., bailiff, and Horace G. Clark, clerk.

Be it remembered, that heretofore and on to-wit: the 10th day of January, A. D. 1902, there were filed in the office of said clerk of said supreme court a certain transcript of record, bill of exceptions and assignment of errors; and contained in and made a part of said transcript of record, bill of exceptions and assignment of errors were writings in words and figures as follows, to-wit:

In the Supreme Court of the State of Colorado.

CHARLES DUNCAN GURNEY, Appellant, }  
vs. } No. —.  
F. C. BROWN, Appellee.

Appeal from the District Court of Teller County.

Assignment of Errors.

Comes now appellant in the above entitled cause, by his attorneys, and alleges:

That at the trial of said cause sundry errors were committed whereby his interests were sacrificed, to his grievous wrong and injury, and that the following, among other errors and grounds of complaint in this regard, exist in connection with said trial, to-wit:

*First.* The findings and judgment of the court are unsupported by the evidence.

*Second.* The findings and judgment of the court are contrary to the weight of evidence.

*Third.* The findings and judgment of the court are against the law.

*Fourth.* The court erred in rendering judgment for defendant and not for plaintiff upon the whole record.

Wherefore, appellant prays that the said judgment and decree be reversed, and that a judgment in favor of appellant be ordered by this honorable court.

J. C. HELM AND  
CHARLES C. BUTLER,  
Attorneys for Appellant.

Endorsed: No. 4445. In the supreme court of the State of Colorado. Charles Duncan Gurney, appellant, vs. F. C. Brown, appellee. Assignment of errors. Filed in supreme court Jan. 10 1902. Horace G. Clark, clerk. J. C. Helm, attorney for — Equitable building, Denver, Colo.

4

In the District Court, Teller County.

CHARLES DUNCAN GURNEY, Plaintiff, }  
*versus* } No. 219.  
 F. C. BROWN, Defendant.

5

UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:  
 County of Teller, }

In the District Court.

Pleas before the Honorable Edward C. Stimson, one of the judges of the district court of the fourth judicial district of the State of Colorado within and for the county of Teller, at a term of court thereof begun and held at the court house, in the city of Cripple Creek, county and State aforesaid, on the eleventh day (it being the second Monday) of September, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

Present: Honorable Edward C. Stimson, judge; Henry McAllister, Jr., district attorney; James T. Stewart, sheriff of said county; F. E. Boynton, clerk of said court.

Attest:

F. E. BOYNTON, Clerk,  
 By E. K. GAYLORD, Deputy.

6 Be it remembered, that thereafter and on to-wit, the 14th day of October, A. D. 1899, there was filed in the office of the clerk of said court a certain summons, which was in the words and figures following, to-wit:

STATE OF COLORADO, } ss:  
County of Teller,

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff,  
versus  
F. C. BROWN, Defendant. } Summons.

The People of the State of Colorado to F. C. Brown, the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff, in the district court of Teller county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint, and if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinabove specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid. The said

7 action is brought by the plaintiff to obtain judgment against you for the recovery of possession of that portion of the Hobson's Choice Lode mining claim situate in the Cripple Creek mining district, Teller county, Colorado, which is in conflict with the Scorpion Lode mining claim, Sur. No. 12641; for the sum of \$2,500 damages for the detention thereof; for the sum of \$125.00 expended in support of this adverse claim; for costs of suit, and for such other and further relief as to the court may seem meet and proper as will more fully appear from the complaint in said action, to which reference is here made; and a copy of which is hereto attached.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will apply to the court for the relief therein demanded.

Given under my hand and the seal of said court, at Cripple Creek, in said county, this 16th day of September, A. D. 1899.

[SEAL.]

F. E. BOYNTON, Clerk.

STATE OF COLORADO, } ss:  
County of Teller,

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within stated action, on this 28th day of September A. D. 1899, by delivering to and leaving with F. C. Brown, the said defendant personally,

in the county of Teller, a copy of the said summons, together with a copy copy of the complaint in the action therein mentioned, thereto attached.

JAMES T. STEWART, Sheriff,  
By MATT DEERING, Deputy.

8      Endorsed: No. 219—Summons, In district court, Teller county, Charles Duncan Gurney, plaintiff,—*vs.*—F. C. Brown, defendant. State of Colorado, county of Teller, *ss.* Office of the sheriff of said county, Sept. 28<sup>th</sup> A. D. 1899. I hereby certify that I received the within summons on the 28<sup>th</sup> day of September, 1899, at 11 o'clock a. m. James T. Stewart, sheriff, by J. D. Harrigan, undersheriff. Filed in the district court of Teller county, Colorado, Oct 14, 1899, F. E. Boynton, clerk.

9      Be it remembered, that thereafter and on to-wit the 18th day of November, A. D. 1899, the same being one of the regular juridical days of the September, A. D. 1899 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:

|                                       |          |
|---------------------------------------|----------|
| CHARLES DUNCAN GURNEY, Plaintiff,     | } Order. |
| <i>vs.</i><br>F. C. BROWN, Defendant. |          |

At this day in open court comes said plaintiff by Jones & Butler, Esqs., his attorneys, and the said defendant by Glidden & McCarthy, Esqs., his attorneys, also comes. Thereupon this cause coming on to be heard upon the demurrer of said defendant to the complaint of plaintiff herein, the same is argued by counsel and submitted to the court, and the court being now sufficiently advised in the premises doth sustain said demurrer and orders that time and until ten days from and after this day be and is hereby allowed to said plaintiff within which to file and amend complaint herein and time and until ten days after receiving service by copy of such amended complaint is hereby allowed to said defendant within which to plead thereto.

10      Be it remembered, that thereafter and on to-wit the 28th day of November, A. D. 1899, there was filed in the office of the clerk of said court a certain amended complaint, which is in the words and figures following, to-wit:—

STATE OF COLORADO, } ss:  
County of Teller,

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }  
vs. } Amended Complaint.  
F. C. BROWN, Defendant.

The plaintiff complains of the defendant and alleges:

1st. That on the 23rd day of June, 1898, and ever since hitherto the plaintiff was and still is the owner and in the actual occupation and possession of the "Hobson's Choice" Lode mining claim, situate in the Cripple Creek mining district, in the county of Teller (formerly the county of El Paso), and State of Colorado.

2nd. That at and before the date last mentioned the plaintiff has declared his intention to become a citizen of the United States before a court of record, to-wit: the superior court of the county of Los Angeles, in the State of California.

3rd. That on the said 23rd day of June, 1898, the plaintiff, who is over the age of twenty-one years, under and by virtue of the laws of the United States governing the discovery and location of lode mining claims, entered upon the unoccupied and unappropriated public domain of the United States and discovered the "Hobson's Choice" Lode mining claim in the Cripple Creek mining district, in the county of Teller (then the county of El Paso) and State of Colorado, and thereafter, and within three months from the date of his said discovery, and on, to-wit the 29th day of June, 1898, he recorded his said claim in the office of the recorder of the said El Paso county by a location certificate which contained the name of the lode, to-wit "Hobson's Choice," the name of its locator, to-wit the said "Chas. D. Gurney, the date of the location, to-wit, June 23rd, 1898," the number of feet claimed on each side of the discovery shaft, to-wit 633.7 feet running N. 15° 45' E. from center of said discovery shaft, and 80 feet running S. 15° 55' W. from center of discovery shaft," and such a description of the lode as should identify the claim with reasonable certainty to-wit: "Beginning at corner No. 1 whence cor. No. 4 sur. No. 8612 Fortuna lode bears N. 18° 11' E. 47.35 feet, thence N. 86° 49' W. 275.99 ft. to cor. No. 2 thence N. 15° 45' E. 713.7 ft. to cor. No. 3 thence S. 86° 49' E. 307.32 ft. to cor. No. 4; thence S. 18° 11' W. 721.16 ft. to cor. No. 1, the place of beginning;" and before filing such location certificate and within sixty days from the date of his discovery, to-wit, on June 29th, 1898, he located his said claim by sinking a discovery shaft upon the said lode to the depth of more than ten feet from the lowest part of the rim of said shaft at the surface, uncovering, exposing, and disclosing a well defined crevice with mineral rock in place.

12 Second by posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of its locator, and the date of the discovery; and third, by marking the surface boundaries of said claim by six (6) substantial posts, hewed on the sides set in toward the claim, and sunk into the ground, to-wit, one at each corner and one at the center of each side line.

4th. The plaintiff has and claims the legal right to occupy and possess said "Hobson's Choice Lode mining claim, and to be entitled to the possession thereof by virtue of a full compliance by himself with the laws of the United States, and those of the State of Colorado, by location and pre-emption and by possession as a lode mining claim, located on the public domain of the United States.

5th. That on or about the 14th day of May, 1898, the defendant wrongfully, and whilst the same did not form part of the unoccupied and unappropriated public domain, entered upon mineral land which now forms a part of the said "Hobson's Choice" Lode claim, to-wit, all that portion of the said Hobson's Choice" Lode claim which is intersected by the exterior lines of sur. No. 12641, known as the Scorpion lode, as shown by the plat, marked "Exhibit B," filed in the land office of the United States at Pueblo, Colorado, on the 17th day of August, 1899, by the plaintiff with his protest and adverse claim against the entry by the defendant of said Scorpion lode sur. No. 12641, for patent said ground so intersected being described as follows:—

Beginning at cor. No. 2, sur. No. 12641, Scorpion lode, thence S. 86° 47' E. 279.09 ft.; thence S. 18° 11' W. 682.67 ft.; thence  
13 S. 20° 40' W. 13.91 ft.; thence S. 88° 52' W. 125.21 ft.; thence N. 86.49' W. 153.68 ft.; thence N. 15° 45' E. 384.2 ft.; thence N. 20° 40' E. 321.99 ft. to place of beginning.

6th. That on the 19th day of June, 1899, the defendant made application to the said United States land office at Pueblo, Colorado, for a patent for the said Scorpion Lode claim as described in the plat and field notes on file in that office as survey number 12641 and published his said application in a weekly newspaper published in the said county of Teller and known as the Weekly Tribune," the first publication appearing in the issue of the said newspaper of the 24th day of June, 1899.

That the plaintiff, during the period of such publication, and to-wit, on the 17th day of August 1899 filed his protest and adverse claim against the entry by the defendant of the said "Scorpion" Lode claim for patent, and within thirty days from the filing of the said adverse claim commenced the present proceedings in support of his said adverse claim.

7th. That the defendant has ever since hitherto wrongfully withheld possession of said parcel of said "Hobson's Choice" Lode mining claim from the plaintiff, to his damage in the sum of two thousand five hundred dollars.

8th. That this suit is brought in support of said adverse claim

and that plaintiff necessarily disbursed, expended and laid out the sum of seventy-five dollars for plats, abstracts, and copies of papers filed in said land office with his said adverse claim, and also a reasonable counsel's fee of fifty dollars for the expense of preparing his said adverse claim.

14 Wherefore, plaintiff prays and demands judgment against the defendant;

First. For the recovery of possession of said described parcel of said "Hobson's Choice" Lode mining claim.

Second. For the sum of two thousand five hundred dollars damages for the detention thereof.

Third. For the sum of one hundred and twenty-five dollars expended in support of said adverse claim.

Fourth. For costs of suit.

Fifth. For such further and other relief as to the court may seem meet and proper.

JONES & BUTLER,  
Attorneys for the Plaintiff.

Endorsed: 219. In the district court, Charles Duncan Gurney, plaintiff,—*vs.*—F. C. Brown, defendant. Amended complaint. Filed in the district court of Teller county, Colorado, Nov. 28, 1899, F. E. Boynton, clerk by E. K. Gaylord, deputy.

15 Be it remembered, that thereafter and on to-wit the 13th day of January, A. D. 1900, there was filed in the office of the clerk of said court a certain answer and cross-complaint, which is in the words and figures following, to-wit:

STATE OF COLORADO, }  
County of Teller, } ss:

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }  
vs. } No. 219. Answer and Cross-  
F. C. BROWN, Defendant. } complaint.

Comes now the defendant above named by Glidden & McCarthy his attorneys, and for answer to the amended complaint of the plaintiff herein denies each and every allegation matter and thing in said complaint alleged and contained.

And for a further and second answer and defense and as a cross complaint herein, the defendant alleges:

1. That on the 13th day of May, 1898, the defendant F. C. Brown, being at that date and ever since remaining a citizen of the United States and over the age of 21 years, entered upon the vacant, unappropriated and unoccupied public mineral domain of the United

States, in the Cripple Creek mining district, in that portion of the county of El Paso, which is now within and a part of the county of Teller, and State of Colorado, and then and there discovered  
16 thereon a well defined vein or lode of valuable mineral bearing rock and located the same as a lode mining claim, 728 feet in length and 300 feet in width and called and named the Scorpion Lode mining claim.

2. That at the time of the said discovery the defendant posted at the point thereof a plain sign or notice, containing the name of the lode, to-wit: the Scorpion; the date of discovery, to-wit, the 13th day of May, 1898; and the name of the discoverer, to-wit: the said F. C. Brown. And thereafter and within sixty days from the date of said discovery, the said defendant sunk or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein, to a depth of more than ten feet below the lowest part of the rim thereof at the surface; and in such shaft and at such depth discovered and disclosed a well defined vein or crevice of rock in place bearing gold, silver and other precious metals in appreciable quantities; and said defendant did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground, one at each corner and one at the center of each side line of said claim; and did then and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

3. That thereafter and within three months from the date of such discovery the defendant did file or cause to be filed with the clerk and recorder of the county of El Paso, in which county said premises were on such date located, a certificate of location of said claim,  
17 containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit, F. C. Brown; the date of location, to-wit, the 13th day of May, 1898; the number of feet in length claimed along the vein on each side of the center of said discovery shaft, to-wit, 712 feet northerly and 16 feet southerly; and the general course and direction of said vein or lode, together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso and State of Colorado.

4. That the defendant now claims ownership and the right to occupy and possess the said Scorpion Lode mining claim under and by virtue of a prior discovery, location, possession and appropriation of said lode mining claim while the same was part and parcel of the unoccupied and unappropriated public mineral domain of the United States, and under and by virtue of a full and complete compliance with each and every of the laws of the State of Colorado, and of the United States governing the discovery, location and appropriation of lode mining claims upon the public mineral domain of the United States within the Cripple Creek mining district, in

the said county of Teller (formerly a part of El Paso county) Colorado, including as well the performance thereon of not less than one hundred dollars' worth of work, labor and improvements during each and every calendar year.

5. That under and by virtue of the premises the defendant is the owner and occupant and has good right to occupy and possess each and every part and parcel of said area and territory

18 included within the exterior surface boundaries of the aforesaid Scorpion Lode mining claim, including as well the premises sued for by plaintiff as the same are mentioned and described in the plaintiff's complaint herein.

Wherefore, the defendant prays judgment that the complaint of the plaintiff herein be dismissed; that the defendant do have and recover of and from plaintiff herein all his costs and disbursements in this behalf expended; and for such other and further judgment, order or relief as may be just and equitable.

GLIDDEN & McCARTHY,  
Defendant's Attorneys.

Service of a copy of the above answer and cross complaint admitted this 13th day of Jan'y, 1900.

JONES & BUTLER,  
Plaintiff's Att'ys.

Endorsed: No. 219—State of Colorado, county of Teller, ss. In the district court. Charles Duncan Gurney, plaintiff vs. F. C. Brown, defendant. Answer and cross complaint—Filed in the district court of Teller county, Colorado, Jan. 13, 1900. F. E. Boynton, clerk, W. E. Foley, deputy.

19 Be it remembered, that thereafter and on to-wit the 23rd day of January, A. D. 1900, there was filed in the office of the clerk of said court a certain replication, which is in the words and figures following to-wit:

STATE OF COLORADO, } ss:  
County of Teller, }

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }  
vs. } No. 219. Replication.  
F. C. BROWN, Defendant.

Comes now the plaintiff, by Jones & Butler, his attorneys, and for replication to the second answer and defense and cross complaint herein, denies each and every allegation, matter and thing in said second answer and defense and cross complaint alleged.

JONES & BUTLER,  
Attorneys for Plaintiff.

Endorsed: 219. In the district court, Teller county. Charles D. Gurney, vs. F. C. Brown, Replication, Filed in the district court of Teller county, Colorado, Jan. 23, 1900. F. E. Boynton, clerk, W. E. Foley, deputy.

STATE OF COLORADO, }  
County of Teller, } ss:

In the District Court.

Pleas before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado within and for the county of Teller, at a term of court thereof begun and held at the court house in the city of Cripple Creek, county and State aforesaid, on the sixth day (it being the first Monday) of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

Present: Honorable Louis W. Cunningham, judge aforesaid; Henry Trowbridge, Esq., district attorney; James T. Stewart, sheriff of said county; A. W. Grant, clerk of said court.

Present: A. W. Grant, clerk, by W. E. Foley, deputy.

Be it remembered, that thereafter and on to-wit the 6th day of May, A. D. 1901, the same being one of the regular juridical days of the May, A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to wit:



STATE OF COLORADO, } ss:  
County of Teller, }

**In the District Court.**

**Please before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado within and for the county of Teller, at a term of court thereof begun and held at the court house, in the city of Cripple Creek, county and State aforesaid, on the 6th day (it being the first Monday) of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.**

Present: Honorable Louis W. Cunningham, judge aforesaid; Henry Trowbridge, Esq., district attorney; James T. Stewart, Esq., *district attorney*; A. W. Grant, clerk of said court.

**Attest:**

A. W. GRANT, Clerk,  
By W. E. FOLEY, Deputy.

Be it remembered, that thereafter and on to-wit: the 15th day of June, the same being one of the regular juridical days of May, A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:

24 CHARLES DUNCAN GURNEY, Plaintiff, }  
vs. } 219. Order.  
F. C. BROWN, Defendant.

At this day in open court come said parties by their attorneys respectively.

Therefore, by consent of the parties herein, it is ordered that cause No. 128 of the civil docket in this court be and the same is hereby consolidated with this cause for the purpose of trial.

CHARLES DUNCAN GURNEY, J. A. SMALL, Plain-  
tiff,  
vs.  
F. C. BROWN, Defendant. } 219-128. Order.

At this day in open court come said parties by their attorneys, respectively. Thereupon this cause coming on for trial before the court, a jury being expressly waived, the same is submitted to the court upon an agreed statement of facts. Thereupon comes the argument of counsel which is continued until the 27th day of June, A. D. 1901.

25 Be it remembered, that thereafter, and on to-wit the 27th day of June, A. D. 1901, the same being one of the regular juridical days of the May, A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:—

|   |   |                 |
|---|---|-----------------|
| CHARLES DUNCAN GURNEY, J. A. SMALL, Plain-<br>tiff,<br>vs.<br>F. C. BROWN, Defendant. | } | 128-219. Order. |
|---|---|-----------------|

At this day in open court come said parties by their attorneys respectively.

Thereupon this cause coming on to be heard upon the continued argument of the parties hereto, it is ordered that the parties continue their argument herein by brief, and the court doth take said cause under advisement.

26 UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:  
County of Teller, }

In the District Court.

Pleas before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for the county of Teller, at a term of court thereof begun and held at the court house, in the city of Cripple Creek, county and State aforesaid, on the 9th day (it being the second Monday) of September, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-sixth.

Present: Honorable Louis W. Cunningham, judge aforesaid; Henry Trowbridge, Esq., district attorney; James T. Stewart, Esq., sheriff of said county A. W. Grant, Esq., clerk of said court.

Attest:

A. W. GRANT, Clerk,  
By W. E. FOLEY, Deputy.

Be it remembered, that thereafter and on to-wit: the 16th day of September, A. D. 1901, the same being one of the regular juridical days of the September A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:—

|  |   |             |
|--|---|-------------|
| 27 CHARLES DUNCAN GURNEY, Plaintiff,<br>vs.<br>F. C. BROWN, Defendant. | } | 219. Order. |
|--|---|-------------|

At this day in open court come said parties by their attorneys respectively: Thereupon, this cause having been heretofore submitted

to the court upon the agreed statement of facts of the parties hereto, and the court having heard all of the arguments of counsel and having fully considered the briefs of the parties hereto, and being now sufficiently advised in the premises, doth find the issues herein joined in favor of the defendant F. C. Brown, and it is ordered that a decree be entered herein in accordance with the finding of the court in this behalf in favor of the said defendant and against the said plaintiff, and that the same be recorded in the judgment book.

To which finding and judgment of the court the plaintiff duly excepts.

28     STATE OF COLORADO, }  
           County of Teller, } ss:

In the District Court.

|  |   |                               |
|--|---|-------------------------------|
| CHARLES DUNCAN GURNEY, Plain-<br>tiff,<br>vs.<br>F. C. BROWN, Defendant. | } | No. 219. Judgment and Decree. |
|--|---|-------------------------------|

On this 15th day of June, A. D. 1901, the same being the 41st day of the regular May term of said court in the year 1901, the above cause came regularly on for trial upon the merits, and the plaintiff, Charles Duncan Gurney being present in person and by his attorneys J. C. Helm and C. C. Butler, and the defendant, F. C. Brown, being present in person and by his attorney T. F. McCarthy, and both parties having announced themselves ready for trial, and a trial by jury having been expressly waived, the trial of said cause was thereupon begun at the court house, in the city of Cripple Creek, Teller county, Colorado, on said date before the Honorable Louis W. Cunningham, one of the judges of said court; and the plaintiff and the defendant herein having submitted their evidence herein by the agreed statement of facts, in writing, filed herein and by documentary evidence therein contained, and both the plaintiff and the defendant having rested, the introduction of evidence herein was thereupon closed; and the court having heard the argument of J. C. Helm, one of the attorneys for the plaintiff herein, the further hearing of said cause was thereupon continued.

29     And on this 27th day of June, A. D. 1901, being the 53rd day of the regular May term of said court, in the year 1901, the above cause came regularly on again for hearing, in pursuance of such continuance before the Honorable Louis W. Cunningham, one of the judges of said court, at the court house in the city of Cripple Creek, Teller county, Colorado, and the plaintiff being present in person and by his attorney, and the defendant being present in person and by his attorney, and both parties hereto having announced themselves ready, and the court having heard the argument of defendant's attorney, and the argument of C. C. Butler, one of the attorneys for the plaintiff in reply thereto, took the said cause under advisement.

And the said court being now sufficiently advised in the premises,  
Doth find the issues herein joined for the defendant, F. C. Brown;  
and

Doth further find that the defendant F. C. Brown has established his right and title to and is entitled to the possession and occupancy of all the ground in controversy herein, to-wit: all of the conflict area between the Hobson's Choice Lode mining claim, claimed by the plaintiff herein, and the Scorpion Lode mining claim, U. S. mineral survey No. 12641, owned by the defendant herein, by reason of the full compliance with all and singular the acts of Congress and the statutes of the State of Colorado relating to the discovery, location and appropriation of lode mining claims upon the public mineral domain of the United States.

30 And thereupon it is ordered, adjudged and decreed that the defendant, F. C. Brown do have and recover of and from the plaintiff, Charles Duncan Gurney all of the area and territory in conflict between the plaintiff's so-called Hobson's Choice Lode mining claim and the defendant's Scorpion Lode mining claim, U. S. mineral survey No. 12641 in the Cripple Creek mining district, Teller county, Colorado, such conflict area being more particularly described as follows, to-wit:—

Beginning at cor. No. 2 sur. No. 12641, Scorpion lode Thence S. 86 deg. 47 min. E. 279.09 ft.; thence S. 18 deg. 11 min. W. 682.67 ft.; thence S. 20 deg. 40 min. W. 13.91 ft.; thence S. 88 deg. 52 min. W. 125.21 ft.; thence N. 86° 49' min. W. 153.68 ft.; thence N. 15 deg. 45 min. E. 384.2 ft. Thence N. 20 deg. 40 min. E. 321.99 ft. to place of beginning.

It is further ordered, adjudged and decreed, that the defendant do have and recover of and from the plaintiff his costs in this behalf expended.

Dated this — day of — A. D. 1901.

By the court:

— — —, Judge.

Endorsed: 219—Filed in the district court of Teller county, Colorado, Sept. 16, 1901, A. W. Grant, clerk, by H. P. Seeds, deputy.

31 CHARLES DUNCAN GURNEY, Plaintiff, }  
vs. } 219. Order.  
F. C. BROWN, Defendant.

At this day in open court comes said plaintiff by his attorney, Charles C. Butler, Esq., and prays an appeal herein to the supreme court of the State of Colorado, which is allowed upon condition that plaintiff give within twenty days from this date a good and sufficient bond in the penal sum of two hundred and fifty dollars, with surety or sureties to be approved by the clerk of this court; and it is ordered that time and until sixty days from this date be and the same is hereby allowed within which to prepare and tender

to the Honorable Louis W. Cunningham, one of the judges of this district court, his bill of exceptions by him reserved herein, and when signed and sealed by said judge, shall be filed herein as of this day.

Be it remembered, that thereafter and on to-wit: the 4th day of October, A. D. 1901, there was filed in the office of the clerk of said court a certain appeal bond, which is in the words and figures following, to-wit:

Know all men by these presents, that we, Charles Duncan Gurney — — of the county of Teller and State of Colorado, are  
32 held and firmly bound unto F. C. Brown in the penal sum of two hundred and fifty dollars, lawful money of the United States, for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at — — this — day of October, in the year of our Lord, one thousand nine hundred and one.

The condition of the above obligation is such, that whereas, the said F. C. Brown did, on the — day of September, one thousand nine hundred and one, at a term of the district court then being holden within and for the fourth judicial district in the county of Teller and State of Colorado, obtain a judgment against the above bounden Charles Duncan Gurney for possession of certain real property in adverse suit, and costs of suit, from which judgment the said Charles Duncan Gurney has prayed for and obtained an appeal to the supreme court of said State of Colorado.

Now if the said Charles Duncan Gurney shall duly prosecute said appeal, and shall moreover pay the amount of the said judgment, costs interest and damages rendered and to be rendered against said Charles Duncan Gurney in case the said judgment shall be affirmed in the said supreme court, or said appeal be dismissed for any reason, than the above obligation to be null and void; otherwise, to remain in full force and virtue.

CHAS. DUNCAN GURNEY. {SEAL}  
JOSEPH STANLEY JONES. {SEAL}  
A. A. ROLLESTONE. {SEAL}

33 STATE OF COLORADO, }  
Teller County, } ss:

Personally appeared this day before me, Clinton S. Harley, of Teller county, A. A. Rolleston, of the county and State aforesaid, one of the securities on the bond of Chas. Duncan Gurney, who, being duly sworn, deposes and says that he is seized and possessed in his own right, over and above all just debts and liabilities, in property not exempt by law from levy and sale under execution of a clear, unincumbered estate of the value of two hundred and fifty dollars within the jurisdiction of this State.

Subscribed and sworn to before me, this 1st day of October, A. D. 1901.

My commission expires August —, 1903.

[SEAL.]

CLINTON S. HARLEY, Notary.

STATE OF COLORADO, }  
El Paso County. }

Personally appeared this day before me, Chas. E. Oehler, notary public of El Paso county, Joseph Stanley Jones of the county and State aforesaid, one of the securities on the bond of Charles D. Gurney, who, being duly sworn, deposes and says that he is seized and possessed in his own right over and above all his just debts and liabilities, in property not exempt by law from levy and sale under execution of a clear, unincumbered estate of the value of two

34 hundred and fifty dollars within the jurisdiction of this State.

JOSEPH STANLEY JONES.

Subscribed and sworn to before me, this 2nd day of October, A. D. 1901.

My commission expires April 10, 1905.

CHAS. E. OEHLER,

Notary Public.

[SEAL.]

Endorsed: 219. Appeal bond—dist. court, Teller county, to supreme court, C. D. Gurney vs. F. C. Brown, Approved and filed in the district court of Teller county, Colorado, Oct. 4, 1901. A. W. Grant, clerk, by W. E. Foley, deputy.

35 STATE OF COLORADO, } ss:  
County of Teller, }

In the District Court.

I, A. W. Grant, clerk of the district court of the fourth judicial district of the State of Colorado, within and for the county of Teller, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain summons, amended complaint, answer and cross-complaint, replication, judgment and decree, appeal bond, and all orders of court had and entered of record in a certain cause in said district court lately pending, wherein Charles Duncan Gurney was plaintiff, and F. C. Brown was defendant, as the same appear of record and on file in my office remaining.

I do further certify, that the attached bill of exceptions, is the original bill of exceptions filed in my office on the 16th day of December, A. D. 1901.

In witness whereof, I have hereunto placed my hand and affixed the seal of said court, at my office in the city of Cripple Creek, county and State aforesaid, this 19th day of November, A. D. 1901.

[SEAL.]

A. W. GRANT, Clerk.

Plff's costs \$17.45

Def't's costs, 5.20

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36 STATE OF COLORADO, } ss:  
County of Teller, }

**In the District Court of the Fourth Judicial District.**

CHARLES DUNCAN GURNEY, Plaintiff, }  
vs. } No. 219.  
F. C. BROWN, Defendant.

### Plaintiff's Bill of Exceptions.

Be it remembered that this cause coming on for trial before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado, at the May, A. D. 1901 term of said court, on, to-wit: the 15th day of June, A. D. 1901, without the intervention of a jury, a jury by consent of the parties hereto being hereby expressly waived, said cause is submitted to the court upon the following agreed statement of facts and exhibits offered in connection therewith:

37 STATE OF COLORADO, } ss:  
County of Teller, }

**In the District Court.**

CHARLES DUNCAN GURNEY, Plaintiff, }  
vs. } No. 219. Stipulation.  
F. C. BROWN, Defendant.

It is stipulated and agreed by and between the parties hereto as between themselves, and by and between the parties hereto and the plaintiff and defendant in a certain suit, No. 128 pending in this court, in which J. A. Small is plaintiff and F. C. Brown is defendant, that the above entitled cause and said suit of Small v. Brown shall be submitted to the court on the same agreed stipulation and statement of facts for judgment upon the merits, a copy of which said stipulation and statement of facts, duly signed by the parties hereto, is filed herewith.

**J. C. HELM AND  
JONES & BUTLER,**  
Attorneys for Plaintiff.

**T. F. McCARTHY,**  
Attorney for Defendant.

**JOHN KNOWLES,**  
Attorney for Plaintiff in Small v. Brown.

**T. F. McCARTHY,**  
Attorney for Defendant in Small v. Brown.

38 STATE OF COLORADO, }  
County of Teller, } ss :

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }  
vs. } No. 219. Stipulation.  
F. C. BROWN, Defendant. }

It is hereby stipulated and agreed, that for the purpose of the trial of this case, the following facts are true, and they may be considered as having been established by competent evidence. It is further stipulated that this case shall be submitted to the court, a jury being hereby expressly waived, on the following statement of facts, to-wit :

1. That on the 28th day of May, 1895, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereto attached and marked "Exhibit A."

2. That on the 16th day of September, 1895, the Commissioner of the General Land Office rendered a decision, a copy of which is hereunto annexed and marked "Exhibit B."

3. That on the 8th day of January, 1896, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereunto annexed and marked "Exhibit C."

4. That on the 5th day of February, 1896, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereunto annexed, and marked "Exhibit D."

39 5. That on the 7th day of April, 1896, the acting Secretary of the Interior (John M. Reynolds) rendered a decision, of which a certified copy is hereunto annexed and marked "Exhibit E."

6. That on the 22nd day of October, 1897, the Commissioner of the General Land Office rendered a decision, of which a copy is hereunto annexed, and marked "Exhibit F."

7. That on the 7th day of May, 1898, the Secretary of the Interior (C. N. Bliss) rendered a decision, of which a certified copy is hereunto annexed and marked "Exhibit G."

8. That on the 13th day of May, 1898, defendant, being at that date and ever since remaining a citizen of the United States, and over the age of 21 years, entered upon the land in question, herein-after particularly described, and then and there discovered thereon a well-defined vein or lode of valuable mineral-bearing rock, and located the same as a lode mining claim, 728 feet in length and 300 feet in width, and called and named the same the Scorpion Lode mining claim.

9. That at the time of the said discovery the defendant posted at the point thereof a plain sign or notice, containing the name of the lode, to-wit: the Scorpion; the date of discovery, to-wit: the 13th day of May, 1898; the name of the discoverer, to-wit: F. C. Brown;

and thereafter, and within 60 days from the date of said discovery, the said defendant sunk or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein to a depth of more than ten feet below the lowest part of the rim thereof at the surface; and in such shaft and at such depth discovered and disclosed a well-defined vein or crevice of rock in place bearing  
40 gold, silver and other precious metals in appreciable quantities, and said defendant did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground, one at each corner and one at the center of each side line of said claim; and did then and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

10. That thereafter, and within three months from the date of such discovery the defendant did file or cause to be filed with the clerk and recorder of the county of El Paso, in which said county said premises were on such date located, a certificate of location of such claim, containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit: F. C. Brown; the date of location, to-wit: the 13th day of May, 1898; the number of feet in length claimed, along the vein on each side of the center of said discovery shaft, to-wit: 712 feet northerly and 16 feet southerly; and the general course and direction of said vein or lode, together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso and State of Colorado.

11. That on the 15th day of July, A. D. 1898, the defendant F. C. Brown, made an amended location of said lode claim, and on said date made an amended location certificate thereof, containing the name of the claim, to-wit: the Scorpion; the name of the  
41 locator, to-wit: F. C. Brown, the date of the amended location, to-wit: July 15th, 1898; the number of feet in length claimed along the vein, to-wit: 693 feet running north 20° 40' east and 25 feet running south 20° 40' west from the discovery shaft thereof, and surface ground 300 feet in width; together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the claim with reasonable certainty; which said location certificate was, on said 15th day of July, A. D. 1898, filed for record and recorded in Book 6, page 48, in the office of the clerk and recorder of said county of El Paso and State of Colorado.

12. That on the 16th day of July, A. D. 1898, the defendant F. C. Brown made an amended location of said lode claim, and on said date made an amended location certificate thereof, containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit, F. C. Brown, the date of amended location, to-wit: July 16th, 1898; the number of feet in length claimed along the vein to-wit: 693 feet running north 20° 40' east and 25 feet running south 20° 40'

west from the discovery shaft thereon, and surface ground 300 feet in width; together with such a description of said claim, with reference to natural objects and permanent monuments as would serve to identify the claim with reasonable certainty; which said location certificate was, on said 16th day of July, A. D. 1898, filed for record and recorded in Book 6, page 49, in the office of the clerk and recorder of said county of El Paso, and State of Colorado.

13. That the defendant has fully and completely complied with each and every of the laws of the State of Colorado, and of the United States, governing the discovery and location of lode mining claims within the Cripple Creek mining district, aforesaid; provided, however, that it is not admitted that at the time of said locations the ground embraced in said location was a part of the vacant and unappropriated public domain. And further, it is admitted that during each and every calendar year since the said discovery and location of the Scorpion claim not less than one hundred dollars' worth of work and labor and improvements have been done and made by defendant, in respect of and to hold such claim.

14. That on the 14th day of June, 1898, the Cripple Creek Gold Mining Company, by its president, filed in the General Land Office an instrument dated June 10th, 1898, of which a copy is hereunto annexed and marked "Exhibit H."

15. That on the 23rd day of June, 1898, the plaintiff had declared his intention to become a citizen of the United States before a court of record, to wit: the superior court of the county of Los Angeles in the State of California.

16. That on the said 23rd day of June, 1898, the plaintiff, who was over the age of twenty-one years, entered upon the land in question hereinafter particularly described, and then and there discovered thereon a well defined vein or lode of valuable mineral bearing rock, and located the same as a lode mining claim 713.7 feet in length and 300 feet in width, and called and named the same the Hobson's Choice Lode mining claim.

17. That at the time of the said discovery the plaintiff posted at the point thereof a plain sign or notice containing the name of the lode, to-wit: the Hobson's Choice; the date of discovery, to-wit: the 23rd day of June, 1898; the name of the discoverer, to-wit: Charles Duncan Gurney; and thereafter and within sixty days from the date of said discovery the said plaintiff sunk or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein to a depth of more than ten feet below the lowest part of the rim thereof at the surface, and in such shaft and at such depth discovered and disclosed a well-defined vein or crevice of rock in place bearing gold, silver and other precious metals in appreciable quantities, and said plaintiff did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground one at each corner, and one at the center of each side line of said claim; and did then

and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

18. That thereafter and within three months from the date of such discovery the plaintiff did file or cause to be filed with the clerk and recorder of the county of El Paso, in which said county said premises were on such date located, a certificate of location of such claim containing the name of the claim, to-wit; the Hobson's Choice, the name of the locator, to-wit: Charles Duncan Gurney; the date of location, to-wit: the 23rd day of June, 1898; the number

44 of feet in length claimed along the vein on each side of the center of said discovery shaft, to-wit: 633.7 feet northerly and 80 feet southerly, and the general course and direction of said vein or lode together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso and State of Colorado.

19. That the plaintiff has fully and completely complied with each and every of the laws of the State of Colorado, and of the United States governing the discovery and location of lode mining claims within the Cripple Creek mining district, aforesaid, with reference to the said Hobson's Choice Lode claim; provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain. And further it is admitted that during each and every calendar year since the said discovery and location of the Hobson's Choice claim not less than one hundred dollars' worth of work and labor and improvements have been done and made by plaintiff in respect of and to hold such claim.

20. That on the 15th day of July, A. D. 1898, the Commissioner of the General Land Office rendered a decision and made an order of which a certified copy is hereto attached, and marked "Exhibit K."

21. That on the 16th day of July, 1898, one J. A. Small was, and ever since has been, a citizen of the United States and over the  
45 age of twenty-one years, and that on the said date, to-wit: the 16th day of July, 1898, the said J. A. Small entered upon the land in question hereinafter particularly described, and then and there discovered thereon a well defined vein or lode of valuable mineral bearing rock, and located the same as a mining claim 728 feet in length by 300 feet in width, and called and named the same the "P. and G." Lode mining claim.

22. That at the time of said discovery the said J. A. Small posted at the point thereof a plain sign or notice containing the name of the lode, to-wit: the "P. and G.;" the date of discovery, to-wit: July 16th, 1898; and the name of the discoverer, to-wit: J. A. Small; and thereafter, and within sixty days from the date of said discovery the said J. A. Small sank or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein to a depth of

more than ten feet below the lowest part of the rim thereof at the surface, and in such shaft and at such depth discovered and disclosed a well defined vein or crevice of rock in place bearing gold, silver and other precious metals in appreciable quantities; and said J. A. Small did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground, one at each corner and one at the center of each side line of said claim; and did then and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

23. That thereafter and within three months from the date of such discovery the plaintiff did file or cause to be filed with the  
46 clerk and recorder of the county of El Paso, in which said county said premises were on such date located, a certificate of location of said claim, containing the name of the claim, to-wit: the "P. and G.;" the name of the locator, to-wit: J. A. Small; the date of location, to-wit: July 16th 1898; the number of feet in length claimed along the vein on each side of the center of said discovery shaft, to-wit: 712 feet northerly and 16 feet southerly, and the general course and direction of said vein or lode; together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso, and State of Colorado.

24. That the said J. A. Small has fully and completely complied with each and every of the laws of the State of Colorado, and of the United States governing the discovery and location of lode mining claims within the Cripple Creek mining district aforesaid with reference to the said "P. and G." Lode claim; provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain. And further it is admitted that during each and every calendar year since the said discovery and location of the said "P. and G." Lode claim not less than one hundred dollars' worth of work and labor and improvements have been done and made by the said J. A. Small in respect of and to hold such claim.

47 25. That on the 27th day of April, 1898, the Commissioner of the General Land Office rendered a decision of which a copy is hereunto annexed and marked "Exhibit I."

26. That on the 19th day of June, 1899, the defendant made application to the United States land office, at Pueblo, Colorado, for a patent for said Scorpion Lode claim, as described in the plat and field notes on file in that office as survey No. 12641, and published his said application in a weekly newspaper published in the said county of Teller, and known as the Weekly Tribune, the first publication appearing in the issue of the said newspaper of the

4  
25th day of June, 1899. That the plaintiff, on behalf of said Hob-

son's Choice Lode mining claim, during the period of such publication, and to-wit: on the 17th day of August, 1899, filed his protest and adverse claim against the entry by the defendant of the said Scorpion Lode claim for patent, and within thirty days from the filing of said adverse claim commenced the present proceedings in support of his said adverse claim; and that the said J. A. Small, on behalf of the said "P. and G." Lode mining claim, during the period of such publication, and to-wit: on the 6th day of July, 1899, filed his protest and adverse claim against the entry by the defendant of the said Scorpion Lode claim for patent, and within thirty days from the filing of said adverse claim commenced a suit in support of said adverse claim in the district court of the county of Teller, in which said suit the said J. A. Small was plaintiff, and the said F. C. Brown was defendant, which said suit was numbered 128 in the register of suits for said Teller county.

48 27. That on the 31st day of July, 1899, the Commissioner of the General Land Office rendered a decision, of which a copy is hereunto annexed, and marked "Exhibit J."

28. That all such proceedings in the United States land office as are recited in the exhibits hereunto annexed to have taken place are to be deemed as having taken place at the dates mentioned in said exhibits.

29. That the descriptions of the said Scorpion, Hobson's Choice and "P. and G." Lode claims, and the areas in conflict are the same given in the pleadings in this action, and the pleadings in the said action of J. A. Small *vs.* F. C. Brown are correct.

J. C. HELM AND  
JONES & BUTLER,  
Attorneys for Plaintiff.  
T. F. MCCARTHY,  
Attorney for Defendant.

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#### EXHIBIT A.

N. DEPARTMENT OF THE INTERIOR, G. F. P.  
L. M. W. GENERAL LAND OFFICE, J. E. W.  
WASHINGTON, D. C., May 28, 1895.

Address only the Commissioner of the General Land Office.

Register and receiver, Pueblo, Colorado.

SIRS: In case of mineral entry No. 573, made March 6, 1895, by the Cripple Creek Gold Mining Company upon the Kohnyo and Fortuna lodes, the approved survey shows that the lode line of said Kohnyo claim intersects the Mt. Rosa placer claim survey No. 7407, and extends within its boundaries for the distance of about 350 feet.

Said placer claim is excluded from this entry, and, as shown by the records of this office, was patented April 24, 1893.

By said above intersection the Kohnyo lode is divided into two

non-contiguous tracts; the tract lying north of said placer claim extending about 500 feet in length along the lode line and containing the discovery shaft and improvements, while the tract on the southerly end of claim extends for a distance of about 700 feet.

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior placer location cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D., 186.

50 The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

The claimant-company may, however, elect which of said tracts it desires to retain, the 500 feet on the north or the southerly 700 feet. If the latter tract is retained evidence of discovery of mineral thereon and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days in which to furnish required evidence or to appeal, in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice.

Should this decision become final, an amended survey will be required, establishing the southerly end line of the claim at the point where the lode intersects the placer claim.

Notify all known parties in interest hereof, in accordance with circular of October 28, 1886.

Very respectfully,

S. W. LAMOREUX,  
Commissioner.

a/24

U. S. LAND OFFICE, } ss:  
Pueblo, Colo., }

I hereby certify that the foregoing has been compared with the original and found to be a true and correct copy.

J. R. GORDON, Register.

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# EXHIBIT B.

N. DEPARTMENT OF THE INTERIOR, W. O. C.  
L. M. W. GENERAL LAND OFFICE, J. E. W.  
WASHINGTON, D. C., September 16, 1895.

Address only the Commissioner of the General Land Office.

Register and receiver, Pueblo, Colorado.

SIRS: By letter N. of May 28, 1895, mineral entry No. 573 made March 6, 1895, by the Cripple Creek Gold Mining Company upon the Kohnyo and Fortuna lodes was held for cancellation as to that portion of said Kohnyo claim lying south of the patented Mt. Rosa placer claim, which divides the lode into two non-contiguous por-

tions, and is excluded from the published notice of application for patent and from entry for said lode.

I am now in receipt of your letter dated August 14, 1895, transmitting a petition of the Cripple Creek Gold Mining Company, through W. H. Leonard, agent, asking that it be allowed to make application for patent for the area in conflict between the Kohnyo lode and Mt. Rosa placer after inquiry has been made as to the existence of said vein according to the rules and regulations of the General Land Office, under the South Star decision, 20 L. D. 204.

It is set forth in said petition that said Kohnyo lode was located in October, 1891, and that said claim contains a vein or fissure of gold bearing rock with well defined walls extending through-  
52 out said claim from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim conflicting with said lode claim extending throughout said placer for a distance of about 350 feet; that application for patent for said placer claim was made August, 8, 1892, after the discovery and location of said Kohnyo lode; that said vein was at the time of the application for the placer "claimed and known to exist;" that it was then and is now a valid subsisting lode of great value; that by the terms of the patent granted for the Mt. Rosa placer said vein of quartz was expressly excepted and excluded from the ground; that the locators of said lode and their grantees have at all times since the location thereof, held, maintained, worked and possessed the said vein and said petitioner is now in possession thereof, and under the ruling of the South Star decision an application for patent can be made by petitioner in favor of the Kohnyo lode for said vein, and that patent may issue to the lode owner when it has been ascertained by inquiry instituted by the department that said lode was known to exist at date of placer application. The allegations contained in said petition are corroborated by the affidavits of several witnesses.

The record shows that the Kohnyo lode was located October 2, 1891, prior to the application for the Mt. Rosa placer, filed August 5, 1892, upon which entry was made and patent issued April 24, 1893.

53 In the South Star decision, to which reference is made, it was held that when it is ascertained by inquiry instituted by the department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of the land covered by a placer patent, and that such lode claim was known to exist at the date of the application for such patent, and was not applied for, the land embraced in said lode is reserved from the operation of the conveyance by the terms thereof and patent may issue for such lode if the law has been in other respects fully complied with.

The case under consideration is in its essential features analogous

to the case of the South Star lode, and the decision above quoted is therefore applicable.

Although the claimant for the Kohnyo lode excluded the ground in conflict with the patented Mt. Rosa placer claim, said lode if known to exist at the date of the placer application, under the terms of exception of the placer patent did not pass to the placer patentee, but the title to the same remains in the United States in trust for the lode claimant, if said claimant, as is alleged, remained in possession of said lode.

The question now to be determined is whether the lode was known to exist within the boundaries of the patented placer claim at the date of filing the placer application.

In view of the above you are hereby directed to notify claimants for the Kohnyo lode that they will be allowed thirty days in which to apply for an order for a hearing to be by them served in accordance with the rules of practice, at which to determine:

I. Whether the said Kohnyo location contains a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

II. Whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim.

You will conduct the hearing in accordance with the rules of practice, and at the proper time transmit the record and evidence to this office, with your joint opinion thereon.

You will also advise the claimants for the entry that in the event of failure to apply for an order for a hearing within the period allowed of thirty days, my decision of May 28, 1895, will become final and the entry canceled in part.

Very respectfully,

S. W. LAMEREUX,  
Commissioner.

a/7

U. S. LAND OFFICE, } ss:  
Pueblo, Colorado,

I, J. R. Gordon, hereby certify that the foregoing has been compared with the original and found to be a true and correct copy.

J. R. GORDON, Register.

June 11, 1900.

55 EXHIBIT C.

|          |                                     |          |
|----------|-------------------------------------|----------|
| C. C. H. | DEPARTMENT OF THE INTERIOR,         |          |
| N.       | GENERAL LAND OFFICE,                | J. V. W. |
| C. H. M. | WASHINGTON, D. C., January 8, 1896. | J. E. W. |

*In re* Mineral Entry No. 573 upon the Kohnyo and Fortuna Lodes.  
On Review.

Register and receiver, Pueblo, Colorado.

SIRS: It appears from the record in the above entitled matter that "the Cripple Creek Gold Mining Company," a corporation, filed in

your office its application for patent for the Kohnyo and Fortuna lodes on March 7, 1894.

Publication of notice was had, first insertion April 22, 1894 and last insertion June 24, 1894. No adverse claim being filed, you allowed applicant to make mineral entry for said two lodes on March 6, 1895.

Said Kohnyo lode was located October 2, 1891, certificate recorded December 29, 1891, and said location was surveyed October 31, 1893. Said Kohnyo lode is in conflict with the Mt. Rosa placer, and the conflict was excluded in the application for patent, the notice published, and the final certificate when issued. The exclusion

56 of said conflict had the effect to divide said Kohnyo lode into two separate non contiguous parts, on which account said mineral entry No. 573 was, by office letter dated May 28, 1895, held for cancellation as to one of the two parts, to-wit, all that part of the Kohnyo location lying south of said Mt. Rosa placer. It appears that said Mt. Rosa placer was located on September 19, 1891, notice recorded on September 29, 1891, and said location was surveyed on May 21, 1892. It further appears that application for patent No. 291, for said Mt. Rosa placer was filed August 5, 1892, mineral entry No. 259, including said Mt. Rosa placer was made on November 7, 1892, and that patent duly issued thereon including the conflict with the Kohnyo lode, dated April 24, 1893.

In said mineral application No. 291 the Kohnyo lode is not claimed, nor is any mention made of said lode.

By your letter of August 14, 1895, you transmitted the petition of entryman in said mineral entry No. 573, for a modification of said office decision of May 28, 1895, that said entryman be allowed a hearing at which to offer evidence for the purpose of showing that at date when said application for patent No. 291 for said Mt. Rosa placer was filed, said Kohnyo location was known to contain a valuable lode, and that in the event said entryman should satisfactorily establish the fact that said lode was valuable, and was known to be so valuable at date when application for said Mt. Rosa placer was filed, that in such case said entryman might be allowed to file a supplemental application and purchase

57 the ground in said conflict. In support of said petition it was alleged, in an affidavit made by the duly authorized agent of entryman "that said claim contains a vein or fissure of gold bearing rock with well defined walls extending throughout said claim from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim, survey No. 7407, conflicting with said lode claim, and extends throughout the said placer for a distance of about 350 feet; that said application for patent for the said placer claim was made August 8, 1892, in the U. S. land office at Pueblo, after the discovery and location of said Kohnyo vein or lode; that said vein was at the time of the application of the aforesaid placer claim claimed and

known to exist, and it was then, and is now a valid, subsisting lode of great value" \* \* \* that the locators of said lode and their grantees have at all times since the location thereof, held, maintained, worked and possessed the said vein, and your petitioner is now in possession thereof." \* \* \*

Said affidavit was in substance corroborated by three other several affidavits, two of which were made by original locators of the said Kohnyo lode. By office letter dated September 16, 1895, said decision of May 28, 1895, was modified, and you were directed to allow the petitioner a hearing. From said letter of September 16, 1895, I quote:

"Although the claimant for the Kohnyo lode excluded the ground in conflict with the patented Mt. Rosa placer claim, said lode, if known to exist at the date of the placer application, under the terms of exception of the placer patent did not pass to the placer patentee, but the title to the same remains in the United States, in trust for the lode claimant, if said claimant, as is alleged, remained in possession of the lode. The question now to be determined is whether the lode was known to exist within the boundaries of the patented placer at the date of filing the placer application. In view of the above you are hereby directed to notify claimants for the Kohnyo lode they will be allowed thirty days in which to apply for an order for a hearing to be by them served in accordance with the rules of practice at which to determine:

"I. Whether the said Kohnyo location contains a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

"II. Whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim."

On December 9, 1895, resident counsel for John McConaghy, claiming to be the assignee of entryman and patentee for the said Mt. Rosa placer, filed a motion for review of said office decision of September 16, 1895, and a revocation of the order for a hearing in said decision contained.

In support of said motion the following specification of errors is on file.

I. Error in giving weight or consideration to the petition of the Kohnyo claimant for a hearing in view of the fact that the motion or petition was not served upon the placer claimant (claimant of record) or its assigns, and also in view of the fact that the lode claimant by the exclusion of the ground in conflict with the placer claim, admitted that its lode did not extend into the conflicting ground.

II. Error in not taking cognizance of the fact that no cause of action is disclosed by the petition, it being nowhere alleged that said Kohnyo lode was at date of placer application known to exist within said placer conflict.

II. Counsel is in error as to the allegations in the petition, as in my judgment the petition alleged facts sufficient to make a *prima*

*facie* case. As conclusively disposing of the second exception of counsel I quote from the sworn petition.

\* \* \* "That application for patent for the said placer claim was made August 8, 1892, in the U. S. land office at Pueblo after the discovery and location of said Kohnyo vein or lode; that said vein was at the time of the application of the aforesaid placer claim, claimed and known to exist, and it was then and is now a valid subsisting lode of great value." \* \* \*

It is elsewhere alleged in said petition that said "claim contains a vein or fissure of gold bearing rock with well defined walls extending throughout said claim from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim, survey 7407, conflicting with said lode claim." \* \* \*

The allegations in the petition are held to be sufficient, and the second exception is not well taken.

60 III. From the third exception, taken in connection with the latter part of the first, I understand the position of counsel to be that the exclusion of the ground in conflict in the application for patent filed by petitioner must be construed as an admission by petitioner that this lode does not enter nor pass through said excluded ground, and that because of such exclusion he is estopped from showing or alleging as a matter of fact that the lode does pass through said ground in conflict. The act of petitioner in excluding from its application the ground in conflict is not necessarily an admission on its part that the Kohnyo lode does not pass through the ground in conflict, and consequently the doctrine of estoppel does not apply. The fact that the exclusion was made was an intimation to the department that at the time petitioner was not asking for a U. S. patent to cover the excluded ground, but it constitutes no binding admission or intimation as to the character of the ground excluded. Moreover, it must be remembered:

1. That at the time when the petitioner filed application for the lode claim, the placer had been patented for almost a year.

2. As the law was then construed by the department the issuance of patent, however erroneously, terminated the jurisdiction of the department over the lands patented, 17 L. D. 280 and 10 L. D. 200.

3. Petitioner therefore would have been unable to get an application of record had it not excluded the ground included in the patented placer so long as the placer patent remained outstanding.

61 Desiring, as it did, to make entry under the then practice, it was compelled to exclude the patented ground, whatever its character might be, and in my judgment this is the fair and logical explanation of the conduct of petitioner in the premises.

I cannot therefore agree with counsel that petitioner is estopped from alleging and showing such facts as will have the effect to dem-

onstrate that the placer patent is, and always was, invalid to the extent of the Kohnyo Lode claim.

IV. In the fourth exception counsel erroneously intimates that this office has decided that the petitioner is in possession of the excluded patented ground. This office has not attempted, to decide that point. The question of possession is a question of fact, and one that must be established by proof, and unless the petitioner can show possession, and the right of possession, he cannot obtain a patent covering the ground. But up to the present time this office has not decided this point nor attempted to do so. But counsel further insists that the act of excluding from the application the conflict with said patented placer is tantamount to an abandonment of the excluded ground, citing Adams decision, 16 L. D., 233.

The doctrine announced in the decision cited must be construed to apply to cases like the one then under consideration. In that case entry No. 201 had been made for the Sunday *et al.* lodes, excluding the conflict of 1.482 acres in conflict between the Sunday lode and the Adams lode.

Subsequently entry No. 413 for the Adams *et al.* lodes was made including the ground in conflict between said Adams lode and the Sunday lode.

62 III. Error in not giving due weight in this case to the doctrine of estoppel not only of record but *in pais*.

IV. Error in holding that the *possession* of said conflict has remained in the lode claimants, when, under the rulings of the Secretary in the Adams Lode case, 16 L. D., 233, the lode claimant has *expressly* waived and relinquished all right, title, claim and interest in and to said conflict.

I. In my judgment there is no rule of practice applicable to the case at bar, which requires that notice of the petition should have been served upon the placer patentee, or his assignees. This class of contests is novel in departmental practice, originating as it does as the result of the doctrine announced in the South Star decision, 20 L. D., 204.

As the law was construed by the department prior to the said South Star decision, the only relief for a lode claimant in a case like the one under consideration, was to cause a suit to be instituted to vacate the placer patent to the extent of the lode, and therefore the department was frequently petitioned to recommend to the Department of Justice that a suit to vacate the placer patent be instituted. In those cases it was not the practice to serve the entryman of record with notice of the petition, but at the hearing or inquest which it was the practice to order with a view to determining whether or not it was expedient to grant the prayer of the petition and recommend the suit, the patentee was always notified and allowed to submit evidence and argument if he chose to do so.

63 As this office construed the South Star decision, a lode claimant has the option of showing in another way a state of

facts which by the terms of the placer patent, renders the same invalid to the extent of any lode contained within the exterior lines of said placer, and reasoning from analogy the practice should be the same. It is therefore held that service of notice of the petition upon the patentee was not required but that the ends of justice will be fully met if legal service of notice of the *hearing* is had upon the present owner of record. But counsel in the first exception further insists that the exclusion of said conflict is an admission that the lode did not extend into the conflicting ground. This proposition will be considered in connection with the third exception.

By office letter of February 27, 1892, it was decided that entryman for the Adams lode could not have patent for the ground in conflict, and said entry No. 413 was held for cancellation to that extent, and entryman for the Sunday lode was required to amend his application to purchase by striking out the clause which excluded the conflict, and to pay ten dollars additional as purchase money and make entry to include the ground in conflict.

The departmental decision cited by counsel reversed said decision, and in effect held that the Sunday application need not purchase or take patent for the ground in conflict if he did not wish to do so, and that inasmuch as said conflict had been excluded by the applicant for the Sunday lode, it was subject to the application for patent

for the Adams lode. An entirely different state of facts obtains in the case at bar, and hence the language used in said departmental decision is not applicable.

If the allegations of the petition herein are true, as stated in my letter of September 16, 1895, the placer patent did not operate to convey to the placer patentee the title to the Kohnyo lode, but the same is still vested in the United States in trust for the lode claimants, if they can show compliance with law.

In any event, the title to the Kohnyo lode did not pass with the placer patent, if said lode was known at date of the placer application, so that in my judgment the owner of the placer is in no position to object to the order for a hearing.

The motion for review is hereby denied, and the order for a hearing will stand as the decision of this office.

Notify the parties in interest.

Very respectfully,

S. W. LAMEREUX,  
Commissioner.

(B-4)

(Here follows diagram marked page 65.)

No. 97.2  
Kohn } p. 65  
Gunn

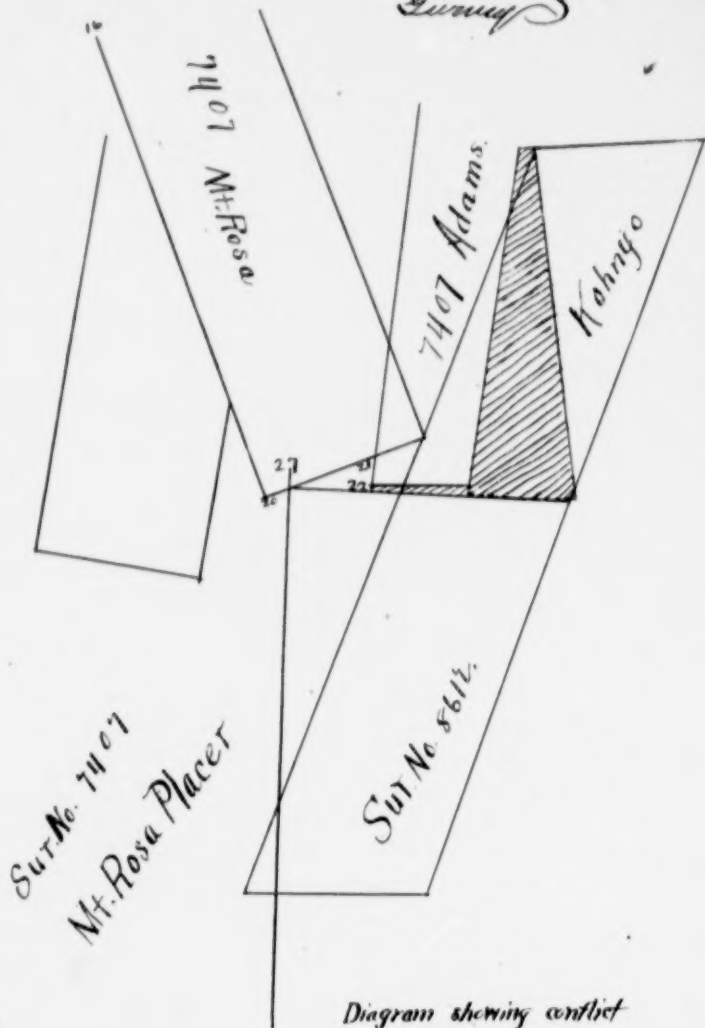
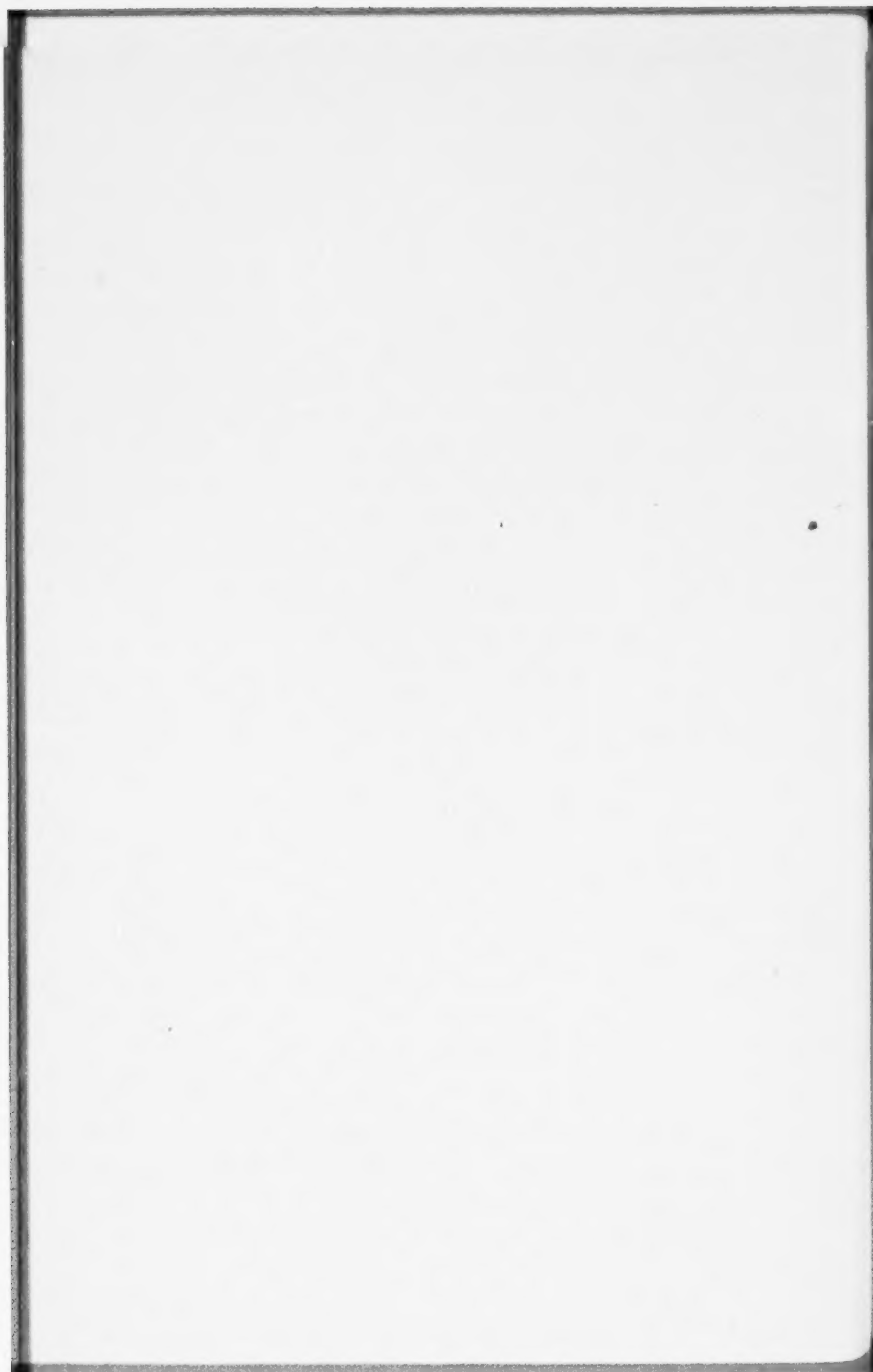


Diagram showing conflict  
between Kohn lode and  
Mount Rosa Placer in Cripple  
Creek Mining District,  
El Paso County, Colorado.

Scale, 200 feet to an inch



66

## EXHIBIT D.

C. C. H. DEPARTMENT OF THE INTERIOR, J. V. W.  
 N. GENERAL LAND OFFICE, J. E. W.  
 L. M. W. WASHINGTON, D. C., February 5, 1896.

Address only the Commissioner of the General Land Office.

*In re* Mineral Entry No. 573, Pueblo, Colorado. The Cripple Creek Gold Mining Company. Kohnyo and Fortuna Lodes.

Register and receiver, Pueblo, Colorado.

SIRS: In the above entitled matter the record of survey shows that the Kohnyo lode is crossed by the patented Mt. Rosa placer claim which divides the lode into two non-contiguous portions.

Said conflict was excluded in claimant's application for patent, as published and in the final certificate of entry.

By office letter N. of May 8, 1895, the entry was held for cancellation as to that portion of the Kohnyo claim lying south of the patented Mt. Rosa placer.

With your letter of August 14, 1895, you transmitted to this office a petition of the Cripple Creek Gold Mining Company, asking that a hearing be allowed for the purpose of showing that at the date of filing application for patent for the Mt. Rosa placer claim the Kohnyo location was known to contain a valuable lode, and  
 67 that in the event that said fact should be established by claimant at said hearing, a supplemental application and purchase of the ground involved might be allowed to be made.

In support of said petition several affidavits were filed alleging the existence of a well defined vein or fissure of gold bearing rock extending throughout said claim from one end to the other, passing through the conflicting Mt. Rosa placer, where it was known to exist at the date of said placer application; also stating that said lode has been from the date of its location in the continuous possession of claimant, and has been worked and developed by claimant up to present date.

By letter N. of September 16, 1895, claimant's petition for a hearing was allowed, said decision holding that the case under consideration is in its essential features analogous to the case of the South Star lode, and further:

"Although the claimant for the Kohnyo lode excluded the ground in conflict with the patented Mt. Rosa placer claim, said lode if known to exist at the date of the placer application," under the terms of exception of the placer patent did not pass to "the placer patentee, but the title to the same remains in the United States in trust for the lode claimant, if said claimant," as is alleged, remained in possession of said lode.

"The question now to be determined is whether the lode was

"known to exist within the boundaries of the patented placer claim  
"at the date of filing the placer application. In view of the above  
"you are hereby directed to notify claimants for the Kohnyo  
68 lode that they will be allowed thirty days within which to  
apply for an order for a hearing to be by them" served in  
accordance with the rules of practice, at which to determine,

I. Whether the said Kohnyo location contains a valuable "lode  
"or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

"II. Whether such lode was known to exist at date of filing application for the Mt. Rosa placer claim."

On December 8, 1895, resident counsel for John McConaghy, assignee of patentee for the Mt. Rosa placer, filed a motion for review of said office decision of September 16, 1895, and a revocation of the order for a hearing.

By letter N. dated January 8, 1896, said motion for review was denied and the order for a hearing affirmed as the decision of this office.

I am now in receipt of a letter dated January 22, 1896, from resident counsel for John McConaghy assignee of the Mt. Rosa Mining Milling and Land Company, forwarding an appeal from my said decision dated September 16, 1895, and January 8, 1896, and containing specifications of error as follows:

I. Error in holding by implication that the Kohnyo claimant was entitled to show possessory title to the conflict between its claim on the Kohnyo lode and the patented Mt. Rosa placer, when by its own acts it expressly waived any possessory right or title to the ground by excluding the same from its publication and entry as well as from its application for patent.

69 II. Error in not holding that the express waiver by the Kohnyo claimant of the ground in conflict, operated as a bar to the setting up of possessory title, and by reason of the fact that the same had passed from the jurisdiction of the United States by letters patent, constituted in so far as the lode claimant is concerned, estoppel by the record.

III. Error in not holding that the expressed disavowal of the Kohnyo claimant of all intention to claim any portion of the conflict between the lode and the placer claim, and in making final entry of the lode excluding the said conflict with the said placer claim, created an estoppel *in pais* which forever barred this claimant for the lode from ever acquiring title to the conflicting placer ground (100 U. S., 578).

IV. Error in not holding that the record itself bars the Kohnyo claimant, and in itself furnishes a sufficient defense for the placer owner in law as well as in equity.

V. Error, in view of the foregoing, in not denying the petition for a hearing, no cause of action being disclosed.

Under rule 81 of practice an appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the

public lands and to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner.

In the case under consideration the order directing a hearing is not such a final determination of the rights of the parties as would entitle the protestants to the right of appeal.

The appeal of protestants from my decision of September 70 16, 1895, and January 8, 1896, will not therefore be entertained, and you will so advise parties in interest, and that the case will remain suspended under rule 85 of practice.

Very respectfully,

S. W. LAMOREUX,  
Commissioner.

a/3

U. S. LAND OFFICE,  
Pueblo, Colorado, } ss:

I, J. R. Gordon, hereby certify that the foregoing has been compared with the original and found to be a true and correct copy.

J. R. GORDON, Register.

18.

71

EXHIBIT E.

Copy.

1542.

F. L. C.

DEPARTMENT OF THE INTERIOR, G. B. G.  
WASHINGTON, April 7, 1896. E. M. R.

*In re* KOHNYO LODE }  
v. }  
MT. ROSA PLACER CLAIM. }

The Commissioner of the General Land Office.

SIR: This is an application made by John McConaghy, assignee of the Mt. Rosa Mining Milling and Land Co., for a writ of certiorari, directing your office to transmit to the department the record in the above entitled case for consideration upon its appeal from the decision of your office of Sept. 16, 1895, directing the local officers at Pueblo, Colorado, to notify the claimants for the Kohnyo lode that they will be allowed thirty days in which to apply for an order for a hearing to determine whether the Kohnyo location contains a valuable lode or vein of mineral quartz within the Mt. Rosa placer limits, and whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim.

McConaghy's appeal was filed January 22, 1896, February 5, 1896, your office decided that McConaghy had no right of appeal and

72      suspended action on the case under rule 85 of practice.  
Under rule 81 of practice no appeal will lie from the decision  
of your office. The application is therefore denied.

The papers transmitted with your office letter "N" of March 7,  
1896, are herewith returned.

Very respectfully,

JNO. M. REYNOLDS,  
Act'g Secretary.

U. S. LAND OFFICE, }  
Pueblo, Colo., } ss:

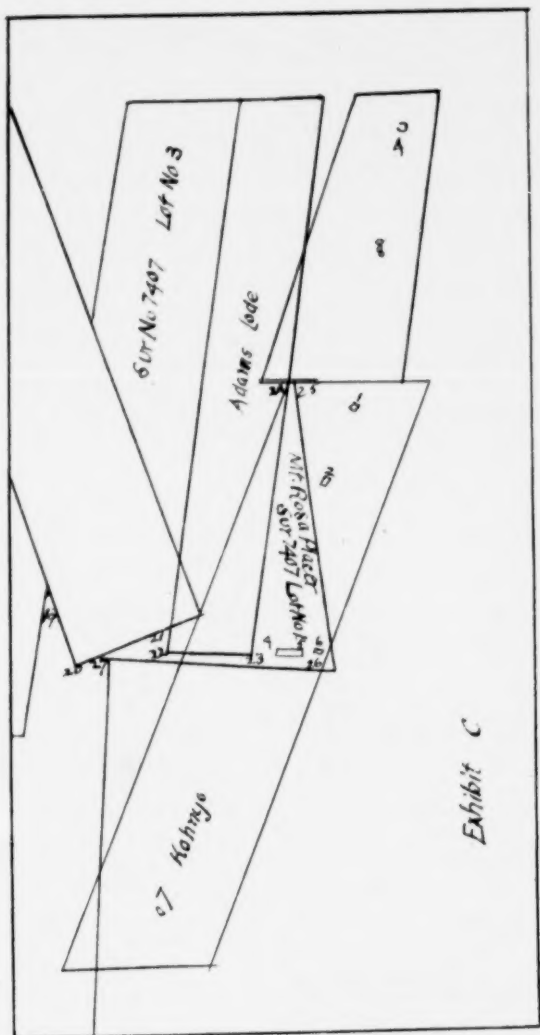
I, J. R. Gordon, do hereby certify that the foregoing has been  
compared with the original on file in this office, and found to be a  
true and correct copy thereof.

J. R. GORDON, Register.

Pueblo, Colo. June 5, 1900.

(Here follows diagram marked page 73.)

No. 97.  
 Brown } p. 73  
 Turner }



Ex "C"

Exhibit C



74

## EXHIBIT "F."

Contest 1314.  
1897-58484.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
WASHINGTON, D. C., October 22, 1897.

Register and receiver, Pueblo, Colorado.

SIRS: The evidence submitted at the hearing in the case of the Cripple Creek Gold Mining Company v. The Mt. Rosa Mining, Milling and Land Company and John McConaghy, assignee,—contest No. 1314, which involves ground in conflict between the patented Mt. Rosa placer claim, survey No. 7407, and the Kohnyo Lode claim, survey No. 8612, was received at this office June 22, 1897, and the entire record has been carefully examined.

The Mt. Rosa placer claim was located *September 19, 1891*, and the survey thereof was approved July 26, 1892.

*August 5, 1892*, the Mt. Rosa Mining Milling and Land Company filed an application for patent, which included the Mt. Rosa placer claim and the Adams, Jefferson, Mt. Rosa, Gold Coin and Rosa Lee Lode claims. Notice of said application was published from August 19, 1892, to and including October 21, following.

November 7, 1892, mineral entry No. 259 was allowed embracing the mining claims described in said application for patent.

The evidence submitted in support of said entry having been examined and found satisfactory, and no adverse nor protest having been filed against said application or entry, patent No. 22774 was issued thereon *April 24, 1893*.

75 In said application, entry and patent there was no express exclusion of the ground in conflict with the Kohnyo Lode claim, but said patent contains the usual recitals excluding known lodes.

The Kohnyo lode was located *October 2, 1891*, and the survey thereof was approved February 26, 1894.

March 7, 1894. The Cripple Creek Gold Mining Company, the contestant herein, claiming the Kohnyo and Fortuna Lode claims, filed its application for patent.

March 6, 1895, no adverse claim nor protest having been filed against the application for the lode claims last mentioned, and the evidence submitted in support thereof being deemed satisfactory, you therefore allowed mineral entry No. 573.

In the published notice of the application for patent for the Kohnyo claim, the application to purchase, the register's final certificate, and the receiver's receipt, the ground in conflict with the Mt. Rosa placer was expressly excluded.

May 28, 1895, the evidence submitted in support of said entry No. 573 was examined and thereupon a decision was rendered from which I quote:

By said above intersections the Kohnyo lode is divided into two

non-contiguous tracts; the tract lying north of said placer claim extending about 500 feet in length along the lode line and containing the discovery shaft and improvements, while the tract on the southerly end of the claim extends for a distance of about 700 feet.

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior  
76 placer location cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D. 186.

The right of the Kohnyo lode, therefore, terminates where it intersects and passes through the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

The claimant company may, however, elect which of said tracts it desires to retain, the 500 feet on the north or the southerly 700 feet. If the latter tract is retained evidence of discovery of mineral thereon and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days in which to furnish required evidence or to appeal, in default of which the entry will be canceled to the extent of that portion of the claim lying south of the patented Mt. Rosa claim, without further notice.

No appeal was taken from said decision, but, with your letter of August 14, following, you transmitted contestant's corroborated petition, which in effect is as follows: That the Kohnyo Lode claim contains a vein or fissure of gold bearing rock with well defined walls, extending throughout from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim conflicting with said lode claim and extends throughout the placer for a distance of about 350 feet; that said vein was, at the time of filing the application for said placer claim, claimed and known to exist; that the locators of said lode claim and  
77 their grantees have at all times since the location held,

worked and possessed said vein; that according to the decision in the case of the South Star Lode claim, 20 L. D. 204, an application for patent may be made for the vein and surface ground in conflict between the Kohnyo survey and the patented Mt. Rosa placer claim, and that application is, therefore, made that petitioner be allowed to make supplemental application for patent embracing the area in conflict between the Kohnyo Lode claim and said placer after inquiry has been made as to the existence of said vein, according to the rules and regulations of this office.

Said petition was considered, and by office letter of September 16, 1895, a hearing was allowed to determine:

1. Whether the Kohnyo location contains a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

2. Whether such lode was known to exist at date of filing application for the Mt. Rosa placer claim.

December 9, 1895, the attorney for John McConaghy, assignee, of the Mt. Rosa Mining, Milling and Land Company, filed in this office

a motion for review and revocation of the decision of September 16th, 1895.

Said motion was considered and by office letter dated January 8, 1896, it was denied.

January 23rd, 1896, the defendants filed an appeal from the decision of September 16, 1895, and January 8, 1896, and this office, by its decision of February 5, 1896, held that the defendants had no right of appeal, and the same was not therefore entertained.

78 February 25, 1896, the attorney for defendants filed an application for writ of certiorari, which was denied by the departmental decision dated April 7, 1896, in which it was held, that under rule 81 of practice, no appeal would lie from the decisions complained of.

October 26, 1896, both parties, with counsel and witnesses appeared at your office, and the hearing was regularly held in accordance with the order contained in office letter of September 16, 1895.

May 1, 1897, you rendered your joint decision upon the evidence submitted. That portion of your decision which follows your statement of the case, is as follows:

The issue upon which testimony was submitted is:

1. Whether the said Kohno location contained a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

2d. Whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim.

A review of the testimony shows conclusively that the contestants have failed to establish the affirmative of either proposition. The three locators, McRay Brothers and Leonard, the superintendent of the work on the claim, the only witnesses for the protestants who had knowledge of the ground in conflict prior to the date of application for the Mt. Rosa placer, August 5, 1892, do not testify that a known lode existed at that time on said ground, but that they believed the veins opened at 1 and 2, "Exhibit C," intersects

79 the placer ground. No testimony whatever was offered to show that any vein was known to exist when application was made for placer patent.

On behalf of the claimants the testimony of witness- Wilson, Hills and Spicer was that they had made careful examination of the ground in conflict for the purpose of ascertaining if any veins or lodes existed at the date of application, and none could be found.

The register and receiver are of the opinion the protest should be dismissed.

June 1, 1897, the contestant filed an appeal from your decision, with specification of errors alleged therein. The specification of errors is as follows:

First. A review of the testimony does not show conclusively that the protestants have failed to establish the affirmative of either proposition.

Second. That the finding by the register and receiver that "the

three locators McRay Brothers and Leonard, the superintendent of work on the claim, the only witnesses for the protestants who had knowledge of the ground in conflict prior to the date of application of the Mt. Rosa placer, August 5, 1892, do not testify that a known lode existed at that time, but that they believed that the vein opened at 1 and 2, Exhibit C, intersected the placer ground," is erroneous and contrary to such evidence.

Fourth. That the finding by the register and receiver that "the testimony of Wilson, Hills and Spicer was that they had made careful examination of the ground in conflict for the purpose of ascertaining if any veins or lodes existed at date of application, and none could be found," is erroneous and contrary to the evidence.

Third. That the finding by the register and receiver that "no testimony whatever was offered to show any vein was known to exist when application was made for the placer patent," is erroneous and contrary to the evidence.

Fifth. That the dismissal of the application or protest of The Cripple Creek Gold Mining Company v. The Mt. Rosa M. M. & L. Company is manifest and material error and contrary to the evidence and law.

Contestant's argument contains a motion to vacate your decision, and in support thereof it is stated that Rope, Key & Co., bankers and brokers, made advertisement in the *Mining Investor* of July 10, 1897, a mining journal published at Colorado Springs, Colorado, as follows: Investors desiring large profits with a minimum of risk should purchase mining stocks on this market at their present low prices.

We believe that A. J., Isabella, Gold Standard, Mt. Rosa, Gould, Bluebell, Jack Pot and Garfield Grouse are good stocks to buy.

It is claimed that Mr. Key, member of said firm of bankers and brokers, and Mr. Key, the receiver, are one and the same person, and that this fact, taken in connection with an order dated March 3rd, 1896, in which the receiver, contrary to orders from this office, notified contestants that this case was dismissed, for want of prosecution shows that the receiver ought not to have participated

81 in the trial of this case.

I have carefully considered the evidence bearing upon the question raised by this motion, and have reached the conclusion that it has not been shown that the receiver had any property interest in the premises involved herein, or any interest of any kind which would disqualify him to act officially in the decision of this case. See *Emblen v. Weed*, 17 L. D., 220.

The attorney for contestees in his argument filed August 7, 1897, submits a motion as follows:

In view of the fact that Messrs. Smith, Leonard and Keith, witnesses for contestant, admit that their knowledge of the land was acquired subsequent to the filing of the Mt. Rosa placer application, and that it was shown at the hearing and by the official survey of

the Kohnyo lode that shafts Nos. 2, 4, 5, 6 and 7, and cut No. 3 (Exhibit C) were made long after the filing of said placer application, we now move that the testimony of said Smith, Leonard and Keith as a whole, be stricken from the record, and that any and all testimony relative to discoveries and developments in said shafts and cut mentioned above, be ruled out of consideration and declared inadmissible because immaterial, irrelevant and incompetent to prove any issue to be tried, and we respectfully ask a definite ruling upon this motion.

The issue between these parties must be determined upon due consideration of the *competent evidence* submitted in the case, and the testimony of the witnesses named in the last mentioned motion, as well as that of the other witnesses will be examined in order to ascertain the weight to be given thereto, under the recognized rules of evidence.

Contestee's motion is therefore denied.

For the purpose of convenient reference, Exhibit "A," which was delineated from the approved plat of the survey of the Kohnyo Lode claim, and a copy of contestant's Exhibit "C," which was regularly introduced in evidence at the trial of the case, are attached hereto.

Upon the trial of this case seven witnesses testified on behalf of the contestants, and six testified on behalf of contestees.

The evidence clearly and satisfactorily shows that a valuable gold bearing vein, between well defined walls, was discovered in the discovery shaft of the Kohnyo claim and in the other shaft shown on Exhibit "A," prior to August 5, 1892. At that time the discovery shaft was about eleven feet deep, and the other about thirty-five or forty. Said discoveries, considered independent of any other facts, would not sustain the allegation that a valuable mineral bearing vein or lode was known to exist within the limits of the ground in conflict between the Kohnyo Lode claim and Mt. Rosa placer, at the time of filing said application for patent. In support of this proposition the following, which occurs in the decision of Dahl v. Raunheim (132 U. S. 263) is quoted.

The discovery by the defendant of the Dahl lode, two or three hundred feet outside of those boundaries, does not, as observed by the court below create any presumption of the possession of the vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them.

The contestant in this case, however, does not rely solely upon the discoveries made in the discovery shaft, and the other shaft shown on Exhibit "A" to sustain its material allegations, but its contention is that the course of the veins disclosed in those shafts, the disclosures made in shaft No. 2 and the other excavations shown on Exhibit "C" by the figures 3, 4, 5, 6 and 7, made subsequent to the placer application, and the outcroppings visible at all times, show that a well defined vein was known to exist within the ground in conflict when said placer application was filed.

The testimony relative to the course of the veins disclosed in the

shafts shown on Exhibit "A" is so conflicting as to be of little value in determining the issues involved in this case.

The evidence shows, that subsequent to the filing of the placer application, several small excavations were made within the limits of the ground in controversy, and that mineral bearing veins were exposed therein, but these disclosures standing alone would not sustain the contestant's case.

Upon a careful consideration of the entire record, I am satisfied that the decision in this case depends upon the conclusions to be drawn from the testimony relative to the outcroppings and float within the limits of the ground in controversy, taken in connection with the disclosures made in the shafts shown on Exhibit "A," within the Kohnyo claim, and upon this point I deem the following to be a fair synopsis of the testimony.

84 C. E. McRay for the contestant testified, in effect, that he was one of the locators of the Kohnyo claim; that the discovery hole was sunk on a vein about two and a half feet wide, between well defined walls; that the vein outcropped north of location stake, also south; that he found outcroppings nearly the entire length of the claim; that the outcroppings consist of quartz rock more or less stained with mineral, and that in 1892, he found the outcroppings of three veins in the Kohnyo claim, one of which run a little east of south, and the other in a southerly direction.

C. F. McRay, for contestant, testified that he was one of the locators of the Kohnyo claim; that there was float all along on the slope of the hill south of the discovery or down as far as across the gulch; that he was satisfied from the float on the side of the hill that there was a vein there; that the ground in controversy is in the gulch and on the other side; that his brother did some work in 1882 on the southern part of the Kohnyo; that his brother called his attention to a small hole that showed mineral, just prospected, and that this hole appeared to be in rock in place, a kind of blow-out with streaks of mineral through it which he thought indicated a vein.

J. E. McRay, for contestants, testified that he was one of the locators of the Kohnyo, and there are two veins outcropping on said claim.

J. F. Smith, who, subsequent to the application for patent to the placer claim, surveyed the Kohnyo claim, testified for the  
85 contestant that, referring to Exhibit "C," there is a red mark across the trench near 4 that represents the outcrop of a vein; that last Friday he followed through from 7 to the north of the gulch where shaft No. 2 is, and nearly all the way, except in the bottom of the gulch where the wash is deep, there was an indication of an outcrop, which in some places seemed to be in place, particularly between 4 and the south end of the claim; that a little west of there is an outcrop that seemed to run nearly north and south.

W. H. Leonard, for contestant, testified that he performed some work on the Kohnyo claim in 1894; that there is a vein that shows

from dump of shaft 1, Exhibit "C," which can be traced by walking along the line of the claim, except where it runs through the gulch, where it is covered with debris; that the surface of that claim is of such character that said rock can be run from place to place, in places it has the appearance of being solid, and in other places the wash would be a few feet deep, in the gulch probably more; that these outcroppings occur in rock in place, especially on that part of the hill where the discovery is.

C. A. Keith, for contestant, testified that he examined the Kohnyo claim in 1893; that he saw outcroppings in a good many places; that in crossing the gulch the vein disappears to some extent, but can be followed on each side, you cannot see it in all places except by a little excavation; that the character of the outcroppings is granite, a ridge of granite quartz the same as many other croppings in that granite country, and the ore is of the nature of granite quartz; that the vein cropping as he traced it is northeast and southwest, or south probably sixteen to twenty degrees; that the vein is disclosed in the discovery shaft and can be traced in about that course out of the south end line in the form of an outcrop.

On this question of outcroppings the following witnesses testified on behalf of the contestees in effect as follows:

G. S. Wilson testified that he was one of the locators of the Mt. Rosa placer; that to the best of his knowledge and belief there was no vein or lode known to exist within the ground in conflict at the time the placer application was filed; that there are no distinct vein croppings of the Kohnyo next to the placer, that there are boulders apparently granite, croppings here and there, but not in a continuous line, and they do not give the appearance of a true vein.

V. G. Hills, a mining engineer testified that he made the survey of the Mt. Rosa placer; that he made two careful examinations of the ground in controversy prior to August 5, 1892; that the ground in conflict is in a ravine between two ridges; that there is too much soil everywhere to disclose outcroppings except in the very summit of the two ridges; that just prior to August 5, 1892, he made an examination of the ground included in the placer to see whether or not there was any known lode; that there was no known lode known to exist at that time on that ground, that there was no evidence of any outcrop on the north end of the Kohnyo that can be traced, there are

evidences of vein formation on the surface but those evidences are not sufficiently definite for the purpose of showing whether they run in the same direction, aside from excavations, the veins cannot be traced; that he does not believe there are any solid croppings of rock in place on the ground in conflict, and that there is no certainty of outcroppings on the Kohnyo that indicate a vein.

J. C. Spicer testified that he had examined the ground in conflict prior to the application for the placer patent, and that no vein or lode was known to exist in the ground.

I hold that the rule of law, announced in *United States v. Iron Silver Mining Co.*, (128 U. S., 683-684) is applicable to the facts obtained from the testimony in this case. Said rule is contained in the following quotation :

It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account and justify their exploitation. Although pits and shafts had been sunk in various places, and what are termed mining cross cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold, or silver or other metal were not disclosed when the application for the patent was made. The subsequent discovery of lodes upon the ground and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time.

Upon a careful consideration of the entire record in this case, including the able briefs and arguments of counsel, I have reached the conclusion, from the evidence, and accordingly so decide, that the contestant has failed to show, by a clear preponderance of the evidence *that at the time of the application for patent for the Mt. Rosa placer claim was filed*, it was known that the ground in controversy herein contained a valuable vein or lode bearing mineral. Your decision as to the facts is, accordingly, modified, and contestant's petition to be allowed, under departmental decision in case of the South Star Lode claim (20 L. D., 204), to enter and receive a patent for the ground in controversy is hereby denied.

Notify the parties in interest hereof, and at the proper time transmit evidence of service, together with all papers filed, and your report as required by circular approved October 28, 1886, (5 L. D., 204).

Very respectfully,  
2.14.

BINGER HERMANN,  
Commissioner.

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## EXHIBIT G.

U. S. L. O., Pueblo, Colo.

Received — o'clock — m., May 19, 1898, from — mail counter.

Vol. 26-62.  
W. V. D.DEPARTMENT OF THE INTERIOR,  
WASHINGTON, May 7, 1898.P. J. C.  
F. L. C.

THE CRIPPLE CREEK GOLD MINING COMPANY }  
v.  
THE MT. ROSA MINING, MILLING AND LAND CO. }

The Commissioner of the General Land Office.

SIR: The Mt. Rosa placer, survey No. 7407, Pueblo, Colorado, land district was located September 19, 1891, application for patent thereto was made August 5, 1892, and patent was issued April 24, 1893. The placer application stated that certain veins or lodes were situate within the boundaries of the placer claim, some of which were included in, and others excluded from the application, but it contained no mention of the Kohnyo vein or lode.

March 7, 1894, the Cripple Creek Gold Mining Company made application for patent, for the Fortuna and Kohnyo Lode mining claims, survey No. 8612. The Kohnyo claim was located October 2, 1891, after the location of the placer claim and before the application for the placer patent, and is intersected about its center by one corner of the placer which extends across the lode claim from one side line to the other, thus dividing the lode claim into two non-contiguous tracts. The Kohnyo claimant did not adverse the placer application.

August 10, 1895, the Kohnyo claimant filed in your office in connection with the prosecution of its application for patent, a petition alleging that the Kohnyo vein or lode was at the time of the placer application, known to exist within the boundaries of the placer and was therefore excepted and excluded from the placer patent, and asking that in the event of its establishing this allegation, it be permitted to obtain patent to the ground in conflict under the ruling of the South Star lode (20 L. D., 204).

On consideration of this petition your office, by letter of September 16, 1895, held that if said vein or lode was known to exist when the placer application was made, August 5, 1892; the title thereto remained in the United States and could not be acquired under the laws relating to lode claims, and ordered a hearing to determine the truth of the lode claimant's allegations.

A hearing was had before the local officers, who held that no vein or lode was known to exist within the ground in conflict at the date of the placer application. On appeal, your office October 22, 1897, affirmed this decision. The case is now before the department on

91 further appeal by the lode claimant, who alleges error in this finding of the local office and of your office and in a ruling requiring the lode claimant to assume the burden of proving the known existence of the vein or lode at the time of the placer application.

In 1891 a shaft was sunk on the Kohnyo location about ten and one-half feet deep, in which a vein or lode of mineral was discovered and in 1892 a second shaft was sunk therein to a depth of twenty to twenty-five feet, prior to August 5, 1892, the date of the placer application. The work in this second shaft disclosed two or three small veins, but whether any of them was the vein disclosed in the first shaft was not known. Both shafts were outside of the placer boundaries and near the northerly end of the lode claim, being distant about two hundred feet from the intersection of the claimed vein with the placer boundary. These veins or lodes had not been shown at that time to possess mineral of sufficient quantity and quality to give them commercial value or to justify expenditure in their extraction. So far as disclosed the veins or lodes in the two shafts appeared to take the general direction of the lode claim and their continuous existence in that direction for the full length of the claim would have carried them through the conflicting portion of the placer, but their presence either within the placer boundaries or in the southerly end of the lode claim was not shown by any discovery or development before the application was made for the placer patent. During the years 1891 and 1892 some small holes were dug in the northerly and southerly ends of the lode claim, and outside of the placer boundaries, but they did not disclose

92 the presence of any vein or lode. This is all that was done in the way of discovery and tracing of the vein in question prior to the date of the placer application. Much testimony was produced at the hearing respecting the subsequent discovery and tracing of a vein or veins — and through the ground in conflict, but since the rights of the placer patentee are to be determined by the conditions prevailing at the date of the placer application evidence of subsequent discovery and development cannot throw any light upon these conditions and should not be considered. Such subsequent discovery and development could not act retrospectively and change or affect the knowledge possessed by the placer claimant or others at the time of the application for placer patent. Upon this question it was said in *United States v. Iron Silver Mining Co.*, (128 U. S., 673, 683):

Lodes and veins in quartz or other rock in place, bearing gold or silver or other metal, were not disclosed when the application for the placer patents was made. The subsequent discovery of lodes upon the ground and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time.

See, also *Sullivan v. Iron Silver Mining Co.* (143 U. S., 431, 434).

It is contended that the Kohnyo vein is shown to have outcropped throughout the length of the lode claim, including the conflict  
 93 with the placer, to such an extent as to be visible to one making an examination of the surface, and that this charged the placer claimant with knowledge of its existence. The evidence on the part of the lode claimant upon this point is not convincing. While some of the witnesses say, in a general way, that the vein did so outcrop, the substance of their testimony is that "float" more or less stained with mineral, was found on the surface of the claim at different points, but that these indications could not be traced continuously through the claim or through the ground in conflict. One of these witnesses, an original locator of the Kohnyo, says: "We could not tell whether it was float from this vein or not."

The testimony on behalf of the placer patentee is to the effect that these so-called outcroppings consist of granite boulders not in a continuous line, and not having the appearance of a vein; that there is too much soil everywhere on the claim except on the summit of the ridges to see an outcrop, and that in the gulch or ravine it was more than eight feet through the wash to the solid formation.

That portion of section 2333 of the Revised Statutes which controls this case reads as follows:

" \* \* \* And where a vein or lode \* \* \* is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the  
 94 boundaries thereof."

The application for the placer patent did not include an application for the Kohnyo vein or lode, and it necessarily follows from the language of the statute that if that vein or lode was known to exist within the placer boundaries at the time of the placer application, the failure of the placer claimant to include therein an application for such vein or lode must be construed as a conclusive declaration that it had no right or claim thereto. Upon the other hand, if the existence of the vein or lode in the placer claim was not known at that time, by the terms of the statute it was embraced in the placer patent, and conveyed to the patentee therein.

The questions therefore which arise upon the record and upon the lode claimant's appeal are:

First. Whether it is shown that this vein or lode was known to exist within the placer boundaries at the time of the placer application; and

Second. Whether the burden of proving such known existence was rightly placed upon the lode claimant.

It is contended that the location of the vein or lode October 2,

1891, based upon a discovery made outside of the placer boundaries and about two hundred feet to the north thereof, gave it the status of a known vein or lode within the meaning of the statute, even though the actual existence thereof had not been discovered either within or to the south of the placer claim. The existence of a

95 vein or lode is necessary to the making of a lode location.

The thing located is a mineral-bearing vein or lode, and the surface ground which can be taken "along the vein or lode" is an incident thereto, intended to facilitate the convenient and safe working of the mine. Where the existence of a vein or lode within a placer claim is otherwise unknown, its existence is not made known by the mere inclusion of that ground within a lode location. The marking of a lode claim upon the ground, and the recording of a location notice, may actually or constructively extend to others the knowledge upon which the lode claimants based their location, but it cannot make known a vein or lode the existence of which is otherwise altogether unknown. The fact that the surface area in conflict was claimed under the lode location prior to the placer application, is not in itself controlling, for if, in fact, the vein or lode was not known to exist within the placer boundaries at that time it was conveyed to the placer claimant by the placer patent. The statute so provides in clear and unambiguous terms. In *Iron Silver Mining Co. v. Reynolds*, (124 U. S., 374, 382) the court said: "The statute does not except veins or lodes" *claimed* or known to exist," but only such as are "known to exist," and it fixes the time at which such knowledge is to be had as that of the application for the patent.

The Supreme Court has had frequent occasion to consider and determine what constitutes a known vein or lode. In *United States v. Iron Silver Mining Co.*, (128 U. S., 673, 683) it was said:

96 "It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify their designation as "known" veins or lodes. To meet that designation the veins or lodes must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

In *Dahl v. Raunheim* (132 U. S. 260, 263) referring to the claimed existence of a known vein or lode within a placer claim at the time of the application for placer patent, the court said: \* \* \* there was no evidence of any lode existing within the boundaries of his claim, either when the plaintiff made his application or at any time before. The discovery of the defendant of the Dahl lode, two or three hundred feet outside of these boundaries does not, as observed by the court below, create any presumption of the possession of a vein or lode within these boundaries, nor, we may add, that a vein or lode existed within them.

In *Iron Silver Mining Co. v. Mike and Star Co.* (143 U. S., 394, 404) the court said:

It is undoubtedly true, that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute.

In *Sullivan v. Iron Silver Mining Co.* (143 U. S. 431, 435) the court held :

And after that, defendants offered a mass of testimony, the scope of which was similar to that condemned as insufficient in the case of *Iron Silver Mining Co. v. Reynolds*, *supra*. Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a blanket vein ; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained no knowledge in respect thereto. It was so far as disclosed by this testimony on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such belief is not the knowledge required by the section. In the case referred to this court said : "There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge, and thus in effect incorporate new terms into the statute."

See, also, *Migeon et al. v. Montana Ry. Co.* (77 Fed. Rep., 249; U. S. App., 724).

The rulings of the Supreme Court upon the exception of mining claims from townsite patents are also worthy of consideration in this connection. In *Dower v. Richards* (151 U. S., 658, 663) it was said :

It is established by former decisions of this court that under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals or even valuable minerals when the townsite patent takes effect ; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them ; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming

under the townsite patent. *Deffeback v. Hawke*, 115 U. S. 392; *Davis v. Webbald*, 139 U. S., 507.

Examined and considered in the light of these decisions the evidence in the case at bar, as hereinbefore summarized, does not show that any vein or lode was known to exist within the ground in conflict when the placer patent was applied for. This conclusion receives some support in the conduct of the lode claimant. If the lode location embraced a vein or lode, the existence of which within the placer boundaries was then ascertained and known, an adverse claim duly filed and prosecuted would have resulted in the direct and special exclusion from the placer patent of such known vein or lode, and the adjoining surface area rightfully incident thereto. While the exception of a known vein or lode not applied for by the placer claimant does not depend upon the filing and prosecution  
99 of an adverse claim, the fact remains that this course presents the most effectual means of obtaining a final and satisfactory determination and adjustment of the rights of the conflicting claimants. The lode claimant, however, did not adverse the placer application, but permitted the issuance of a patent for the area in conflict as placer ground, April 24, 1893; March 7, 1894, it made application for patent for the lode claim excluding therefrom and from the published and posted notices thereof the area in conflict and mineral entry thereof likewise excluding the conflict, was made March 6, 1895. It was not until after your office had ruled that the non-contiguous tracts upon either side of the intersecting placer could not be entered as one lode claim and had required the lode claimant to elect which of the two tracts it would take, that any right was asserted under the lode claim to the area in conflict. Under these circumstances it was that the existence of a vein or lode within the placer boundaries was alleged to have been known when the placer application was made. While this subsequent conduct of the lode claimant could not alter or change the conditions existing at the time of the placer application, and by which the rights of the parties must be determined, it may properly be referred to and considered as tending to show the lode claimant's estimate and opinion of those conditions and its rights thereunder.

The placer claimant has a Government patent for the land in controversy, obtained from a showing held by the Land Department to establish the placer character thereof, and the lode claimant has  
100 attacked that patent alleging that this land contained when the patent was applied for a known vein or lode and was therefore excepted from the operation of the patent. This allegation amounts to nothing if not sustained by proof. The placer patentee was certainly not called upon to support the title apparently conferred by the patent simply because it was assailed by some one who found an obstacle to the obtaining of title to the same ground. It was therefore incumbent upon the lode claimant to establish the truth of its allegations, and the burden of proving

them was rightly placed upon it. *Discovery Placer Claim v. Murry* (25 L. D., 460, 463).

For the reasons stated your office decision is affirmed.

Herewith are returned the papers.

Very respectfully,

C. N. BLISS, Secretary.

U. S. LAND OFFICE, }  
Pueblo, Colorado, } ss :

I, J. R. Gordon, do hereby certify that the foregoing has been compared with the original on file in this office and found to be a true and correct copy.

J. R. GORDON, Register.

June 6, 1900.

101

# EXHIBIT H.

STATE OF RHODE ISLAND, }  
County of Providence, } ss :

Lyman B. Goff, of lawful age, being first duly sworn, deposes and says that he is the duly elected and acting president of the Cripple Creek Gold Mining Company, which company is the owner of the Kohnyo and Fortuna Lode mining claims, covered by Pueblo, Colorado, mineral entry No. 573, which was made March 6, 1895.

Affiant says that he has been fully advised as to the contents of a letter or decision of the Commissioner of the General Land Office of date May 28, 1895, and of the decision of the Secretary of the Interior of date May 7, 1898.

With authority so to do, affiant hereby waives the right of review of the last mentioned decision, and elects to retain in said M. E. No. 573, that portion of the Kohnyo Lode claim which is described in the above mentioned letter of the Commissioner as "the five hundred feet on the north."

Further affiant saith not.

(Signed)

LYMAN B. GOFF.

Subscribed and sworn to before me, this 10th day of June, A. D. 1898.

(Signed)

ANDREW M. HULL,

[SEAL.]

Notary Public.

Election by C. C. G. M. Co. to take north tract.

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## EXHIBIT I.

1899-31010.

" 43116.

N.  
C. A. B.DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
WASHINGTON, D. C., April 27, 1899.

Register and receiver, Pueblo, Colorado.

Sirs: March 6, 1895, the Cripple Creek Gold Mining Company made mineral entry No. 573 for the Kohnyo and Fortuna Lode claims embraced in mineral entry No. 8612, but, in said entry, the conflict with the Mt. Rosa patented placer claim, mineral entry No. 7407, was expressly excluded.

By said conflict and exclusion the Kohnyo Lode claim was divided into two non-contiguous tracts; the tract lying north of said placer containing the discovery shaft and improvements. See attached diagram.

Upon the examination of said entry a decision was rendered May 28, 1895, from which I quote:

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior placer location, cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D., 186.

The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

103 The claimant company may, however, elect which of said tracts it desires to retain, the five hundred feet on the north or the southerly 700 feet. If the latter tract is retained evidence of discovery of mineral thereon, and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days within which to furnish required evidence or to appeal, in default of which the entry will be canceled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice.

Should this decision become final an amended survey will be required, establishing the southerly end line of the claim at the point where the lode intersects the placer claim.

Upon the rendition of said decision the claimant of the Kohnyo Lode claim filed a petition to be allowed to amend its entry by including therein the ground in conflict with said placer claim, and upon said petition contest No. 1314, *The Cripple Creek Gold Mining Company v. The Mt. Rosa Mining and Milling and Land Company* ensued, which contest has been finally decided adversely to the Kohnyo claimant. See 26 L. D., 622.

From letter of July 15, 1898, relative to said entry No. 573, I quote:

In view of the fact that no motion for review of the departmental decision of May 7, 1898, affirming the decision rendered by this office May 28, 1895, was filed within the time prescribed by rules of practice, the decision last mentioned became final and it now devolves upon this office to execute the same.

104 In view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim except as to that portion of the ground lying easterly of line 25-26, survey No. 7407, for the Mt. Rosa patented placer claim.

The claimant of the Kohnyo Lode claim will be allowed sixty days from due notice hereof within which to take the proper steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled in its entirety.

The surveyor general of Colorado, with his letter of February 24, 1899, submitted the approved field notes and plat of an amended survey of the Kohnyo and Fortuna Lode claims. The boundaries of the Kohnyo claim and the lode line as shown upon the amended plat are indicated by blue lines upon the attached diagram.

A careful examination of the original survey of, and the application for patent for said lode claims discloses that the applicant applied for a lode vein beginning at the discovery shaft of the Kohnyo and running N.  $20^{\circ} 40'$  E. 70 feet and S.  $20^{\circ} 40'$  W., 1319.9 feet.

Upon the plat of the amended survey the line of the Kohnyo Lode vein is described as beginning at the same discovery shaft and running N.  $7^{\circ} 20'$  E., 67.51 feet, and S.  $7^{\circ} 20'$  W., 495.87 feet.

With your letter dated March 7, 1899, you transmitted the protest of John McConaghy, against the approval and acceptance  
105 of the amended survey in this case.

The protest is corroborated, and therein the protestant alleges, in substance, that he is the owner of the Hypatia Lode claim which conflicts with the Kohnyo Lode claim as described in the amended survey thereof; that in the amended survey the southerly end line is established at a point far south of that at which the Kohnyo vein intersects line 25-26 of the Mt. Rosa placer claim, and that the deputy mineral surveyor has attempted to mislead this office into the idea that the Kohnyo lode intersects the southerly end line as shown in the amended survey.

The protestant further alleges that his rights on the Hypatia Lode claim would be interfered with and destroyed by establishing the southerly end line as established by the amended survey.

April 10, 1899, the attorneys for the entryman submitted a request or motion to have patent issued without further delay for the Fortuna Lode claim, leaving the entry intact as to the Kohnyo claim, and the question of issuance of patent therefor to be determined subsequently.

There is an apparent issue of fact between the entryman and this

protestant as to the true position and course of said vein. The entryman's contention, as indicated by the amended survey being that the true lode line does not intersect line 25-26 of the said placer claim at the point indicated by the original survey, but at a point considerably south thereof shown by the plat of the amended survey. With this contention the protestant takes issue and alleges that the Kohnyo vein does not take the direction indicated  
106 on the amended plat, and that the location is void beyond the point where the Kohnyo vein intersects the patented placer as claimed by the applicant at the time of the hearing heretofore had.

Carefully considering the protest in connection with the entire record in the case, a serious doubt arises as to the position and course of the Kohnyo vein. Therefore you will notify said protestant that he will be allowed thirty days within which to apply for an order for a hearing at which evidence may be submitted by both parties to determine the true position and course of the Kohnyo vein, and to determine further at what point said vein on its southerly strike intersects one of the boundary lines of the Kohnyo Lode claim, as described in the amended survey thereof.

The request of claimant that the Fortuna claim be passed to patent on the entry and the Kohnyo claim be held in abeyance to be patented hereafter upon the same entry cannot be granted. There has been no decision or ruling of this office against the patenting of the claims together in the regular and proper way as applied for and entered, and the desire of the claimant to expedite action on the Fortuna claim is not sufficient reason for departure from the regular practice and rule of the office.

If the claimant so elects the entry will be canceled as to the Kohnyo claim and allowed to proceed as to the Fortuna, proceedings *de novo* could then be commenced for the Kohnyo, this is the uniform course in such cases.

The protest above mentioned is herewith returned that it may be used at the hearing, in case one should be held.

107 Notify parties in interest hereof, and in due time make report as required by the regulations.

Very respectfully,

(Signed)

BINGER HERMANN,  
Commissioner.

M. E. McA. 24.

108

## EXHIBIT J.

"N."

1899-89301-90335.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
WASHINGTON, D. C., July 31, 1899.

Register and receiver, Pueblo, Colorado.

SIRS: March 6, 1895, the Cripple Creek Gold Mining Company made mineral entry No. 573 for the Kohnyo and Fortuna Lode claims, embraced in mineral entry No. 8612.

By decision of this office rendered May 28, 1895, said entry was held for cancellation as to the southerly portion of the Kohnyo Lode claim.

From said decision I quote: "Should this decision become final an amended survey will be required, establishing the southerly end line of the claim at the point where the lode intersects the placer claim."

A contest ensued.

In a decision rendered by this office July 15, 1898, it was stated that "in view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim except as to that portion of the ground lying easterly of line 25-26, survey No. 7407, for the Mt. Rosa patented placer.

"The claimant of the Kohnyo Lode claim will be allowed sixty days from due notice hereof within which to take the proper  
109 steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled in its entirety."

The surveyor general of Colorado, with his letter of February 24, 1899, submitted the approved field notes and plat of an amended survey of said lode claim.

A careful examination of the original survey of, and the application for patent, for said lode claims discloses that the applicant applied for a lode or vein beginning at the discovery shaft of the Kohnyo claim and running N. 20° 40' E., 70 feet, and S. 20° 40' W., 1319.9 feet.

Upon the plat of the amended survey the line of the Kohnyo lode or vein is described as beginning at the same discovery shaft, and running N. 7° 20' E., 67.51 feet, and S. 7° 20' W., 495.87 feet.

With your letter of March 7, 1899, you transmitted the protest of John McConaghy, against the approval and acceptance of the amended survey in this case.

The protestant alleged, in substance, that he is the owner of the Hypatia Lode claim which conflicts with the Kohnyo Lode claim

as described in the amended survey thereof; that in the amended survey the southerly end line is established at a point far south of that at which the Kohnyo vein intersects line 25-26 of the Mt. Rosa placer claim, and that the deputy mineral surveyor has attempted to mislead this office into the idea that the Kohnyo lode intersects the southerly end line as shown in the amended survey.

The protestant further alleged that his rights on the Hypatia Lode claim would be interfered with and destroyed by establishing the southerly end line as established by the amended survey.

By decision of this office, dated April 27, 1899, the request for the issuance of a patent for the Fortuna Lode claim, leaving the Kohnyo claim to be subsequently disposed of, was denied, and the said protestant was allowed thirty days within which to apply for an order for a hearing to determine the true position and course of the Kohnyo vein.

An appeal was taken from the decision of April 27, 1899, and thereupon the honorable Secretary rendered a decision June 3, 1899 (28 L. D., 451) which see.

By the terms of said departmental decision, the Cripple Creek Gold Mining Company was allowed to have a patent issued for the Fortuna Lode claim, and the patent has accordingly been issued. As to the Kohnyo claim, the decision last mentioned allowed said company to commence proceedings for the reinstatement of said entry, and directed that further action on the appeal be deferred until the question of the reinstatement of the Kohnyo entry as to the southern portion of the Kohnyo location has been determined.

July 18, 1899, Messrs. Thayer & Rankin, the attorneys of record for said company filed with the honorable Secretary a withdrawal of the appeal from the decision of this office dated April 27, 1899.

July 18, 1899, Messrs. Thayer and Rankin filed in this office a paper signed by them as attorneys for said company, and from said paper I quote: "In the matter of John McConaghy, protestant

111 *vs.* The Cripple Creek Gold Mining Company, Pueblo, Colorado, mineral entry No. 573, Kohnyo lode, we have the honor to enclose herewith a copy of our *withdrawal of appeal* from your decision "N" of April 27, 1899, which withdrawal we have this day filed with the honorable Secretary of the Interior. \* \* \*

"Acting under instructions from the Cripple Creek Gold Mining Company, we hereby waive all claims to right of reinstatement of the said southern portion of the Kohnyo location.

"In March last one John McConaghy, representing himself as owner of the Hypatia Lode claim, filed a protest against the amended survey of the Kohnyo Lode claim, which was approved by the U. S. surveyor-general February 24, 1899, and in your decision of April 27, 1899, you allowed the protestant thirty days within which to apply for a hearing on said protest.

"We are directed by our clients to waive all claims under said amended survey and to concede the course of the vein as given in

the original location and official survey, and we hereby make such waiver and concession.

"The purpose and effect of this waiver and concession is to eliminate the controversy with said protestant.

"We have now the honor to apply for a further amended survey of the north end of the Kohnyo, for the purpose of establishing the southerly end line at the point where the vein intersects the line of the patented Mount Rosa placer, relying upon the course of the vein as given in original location on official survey."

112 In view of the foregoing, the amended survey of the Kohnyo and Fortuna Lode claim, is hereby rejected and vacated, and the order for a hearing contained in the decision of April 27, 1899, is now recalled, and McConaghy's said protest is dismissed, in view of the subsequent action taken.

You will notify the Cripple Creek Gold Mining Company that sixty days are allowed within which to file with the surveyor general application for an amended survey in accordance with the decision of May 28, 1895, or to appeal, and that in case of default said entry will be canceled as to the Kohnyo Lode claim.

113

## EXHIBIT K.

N.

E. C. F.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., June 29, 1900.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, pages 1 to 5 inclusive, of office decision of July 15, 1898, in case of the Kohnyo Lode claim, mineral entry No. 573, Pueblo, Colorado, land district, is a true and literal exemplification of the record of said decision on file in this office.

[SEAL.] In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMANN,

Commissioner of the General Land Office.

114

N. DEPARTMENT OF THE INTERIOR, W. O. C. H. G. P.  
C. A. B. GENERAL LAND OFFICE, J. V. W.

WASHINGTON, D. C., July 15, 1898.

Register and receiver, Pueblo, Colorado.

SIRS: The Kohnyo Lode claim, survey No. 8612, conflicts with the patented Mt. Rosa placer claim, survey No. 7407, as shown by the attached diagram delineated from the approved surveys.

March 6, 1895, the Cripple Creek Gold Mining Company made mineral entry No. 573 for the Kohnyo Lode claim exclusive of the conflict with said patented placer claim.

By said conflict and exclusion the Kohnyo Lode claim was divided into two non-contiguous tracts; the tract lying north of said placer containing the discovery shaft and improvements.

Upon the examination of said entry a decision was rendered May 28, 1895, from which I quote:

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior placer location, cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D., 186.

The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

115 The complainant-company may, however, elect which of said tracts it desires to retain, the five hundred feet on the north or the southerly 700 feet. If the latter tract is retained, evidence of discovery of mineral thereon, and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days in which to furnish required evidence or to appeal, in default of which the entry will be canceled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice from this office.

Upon the rendition of said decision the claimant of the Kohnyo Lode claim filed a petition to be allowed to include in its entry the ground in conflict with said placer claim, and upon said petition contest No. 1314, The Cripple Creek Gold Mining Company v. The Mt. Rosa Mining and Milling and Land Company ensued, which has been finally decided adversely to the Kohnyo claimant, and was closed by my letter of June 27, 1898.

June 14, 1898, the claimant of the Kohnyo claim filed in this office an instrument executed by the president of the Cripple Creek Gold Mining Company, in which he waived the right of review of the departmental decision in the contest referred to, and elected to retain in said entry that portion of the Kohnyo claim described as the five hundred feet on the north.

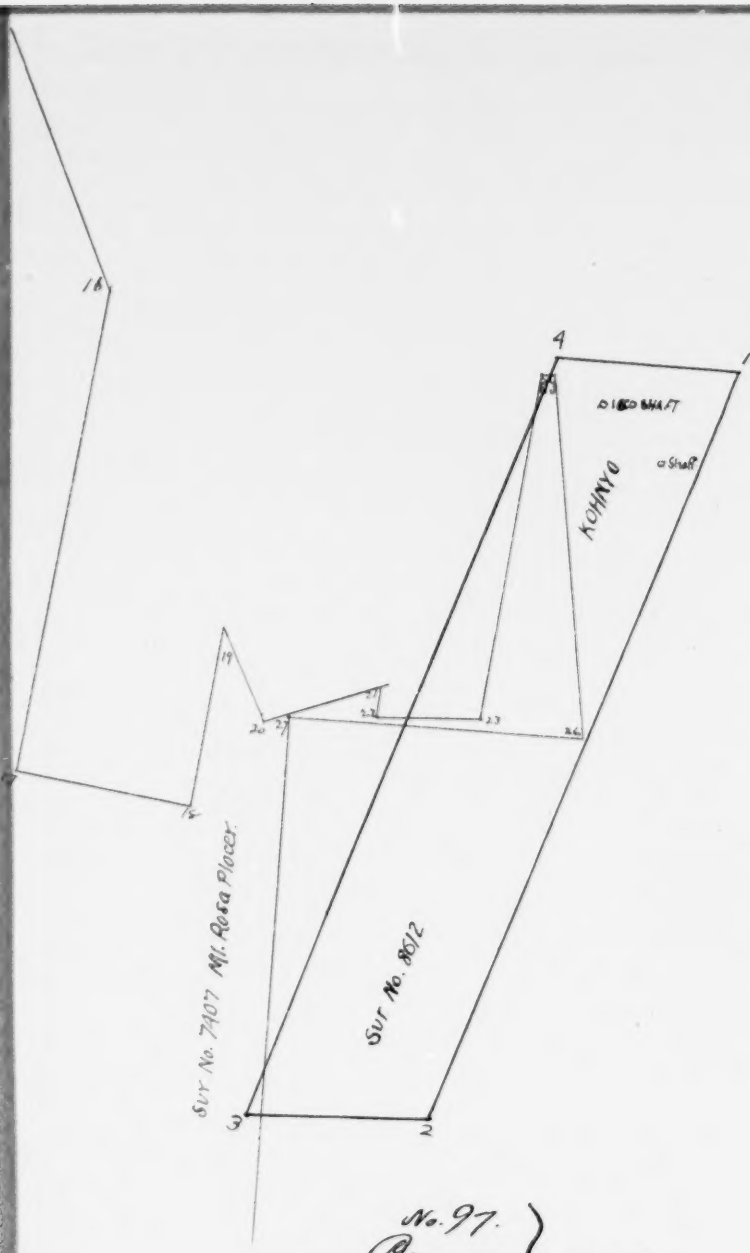
June 17, 1898, there was filed in this office a petition praying that the petitioner be allowed to patent, under its present application, the two detached parts of the Kohnyo lode, for reasons substantially as follows:

116 1. That a well defined mineral bearing vein has been discovered and opened up in each end of the Kohnyo claim.

2. That affidavits now presented show that a conspiracy has been formed to prevent the petitioner from developing the southern end of its claim, so that it has not had a fair opportunity to prove which end of its claim it would prefer to vacate.

3. That the conspiracy is of such proportion as to effect the action of the police courts and justices of the peace to the extent that employees of the petitioner have been arrested and thrown into jail





No. 97.  
 Crown } p 119  
 v.  
 Gurney }

and put under bonds for attempting to work upon ground covered by the receiver's receipt.

4. That the ground is of great value and that the parties desiring to secure the same are closely in touch with the Mt. Rosa Mining and Milling Company, the Woods Investment Company and John McConaghy, who claim some interest in the ground.

There has also been filed the affidavit of Charles D. Gurney and W. G. Smith, which, in the main, support the averments contained in said petition.

June 17, 1898, there was received the protest of F. C. Brown, corroborated by John McConaghy, in which the protestant alleges, in effect, that he is the owner of the Scorpion Lode claim in conflict with the southerly portion of the Kohnyo claim; that at date of the Kohnyo entry no mineral had been discovered upon that portion of the claim lying south of the said patented placer claim and that the Kohnyo improvements are situated upon the northerly portion of the claim. The protestant therefore, objects to the allowance of any discretion on the part of the Kohnyo claimant as to which  
117 of the two non-contiguous portions of the Kohnyo lode shall be canceled.

June 27, 1898, there was received at this office a protest by John McConaghy, corroborated by H. E. Woods and C. L. Arzens, in which the protestant alleged that the claim of the claimant of the Kohnyo claim was illegal as to all of the ground south and east and south and west of the point where said Kohnyo lode on its strike southwest from the discovery, intersects said patented placer claim, which ground he has embraced in his location of the Hypatia Lode claim.

In view of the fact that no motion for review of the departmental decision of May 7, 1898, affirming the decision rendered by this office May 28, 1895, was filed within the time prescribed by the rules of practice, the decision last mentioned became final and it now devolves upon this office to execute the same.

In view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim, except as to that portion of the ground lying easterly of line 25-26, survey No. 7407, for the Mt. Rosa patented placer claim.

The claimant of the Kohnyo Lode claim will be allowed sixty days from due notice hereof within which to take the proper steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled in its entirety.

Notify parties interested, and at the proper time transmit evidence of service, together with all papers filed and your report. See circular approved October 28, 1886, 5 L. D., 204.  
118

Very respectfully,

BINGER HERMANN,

Commissioner.

(B-13)

(Here follows diagram marked p. 119.)

120 And thereafter, and on the 16th day of September, A. D. 1901, the court rendered its findings in said cause, which were in favor of the defendant, and against the plaintiff; to which findings of the court the plaintiff, by his counsel, then and there duly excepted.

And thereupon, and on the same day, the court entered judgment herein in favor of the defendant, and against the plaintiff, in accordance with the findings heretofore rendered herein; to which judgment, and to the entry thereof, the plaintiff, by his counsel, then and there duly excepted.

And thereupon, and on said day, the plaintiff herein prayed an appeal to the supreme court of the State of Colorado, which was allowed upon condition that the plaintiff file within 20 days from this date his appeal bond in the penal sum of \$250, with sureties to be approved by the clerk of this court; and time and until 60 days from this date is allowed the said plaintiff within which to prepare and tender his bill of exceptions by him reserved herein.

And thereafter and on the 4th day of October, 1901, the plaintiff filed his appeal bond herein, which was then and there and on said day approved by the clerk of said court.

And now, forasmuch as the above and foregoing matters and things do not fully appear of record, the plaintiff tenders this,  
121 his bill of exceptions herein, and prays that the same may be signed and sealed by the judge of this court, and made a part of the record herein, pursuant to the statute in such case made and provided; which is accordingly done on the 14th day of December, A. D. 1901.

LOUIS W. CUNNINGHAM, [SEAL.]  
Judge of the District Court of the Fourth  
Judicial District of the State of Colorado.

Tendered to me on this 8th day of November, A. D. 1901.

LOUIS W. CUNNINGHAM, Judge. [SEAL.]

O. K.

POTTER AND McCARTHY,  
Attorneys for Defendant.

Endorsed: 219 Filed in the district court of Teller county, Colorado, Dec. 16, 1901. A. W. Grant, clerk; — — deputy.

Endorsed: 4445. Filed in supreme court Jan. 10 1902. Horace G. Clark, clerk.

122 Endorsed: No. 4445. In supreme court, State of Colorado. Charles D. Gurney, appellant, vs. F. C. Brown, appellee. Transcript of record. Bill of exceptions. Assignment of errors. Filed in supreme court this 10th day of Jan., 1902. H. G. Clark, clerk.

## 123 In the Supreme Court of the State of Colorado.

Pleas before the honorable the supreme court of the State of Colorado, sitting at Denver, in said State, at a term thereof begun and held at the capitol building, in said city, on the second Monday of January, A. D. 1904, and of the Independence of the United States the one hundred and twenty-eighth.

Present: Hon. William H. Gabbert, chief justice, Hon. Robert W. Steele, Hon. John Campbell, justices. Nathan C. Miller, Esq., attorney general, Felix A. Richardson, Esq., bailiff, and Horace G. Clark, Esq., clerk.

Be it remembered, that thereafter and on to-wit: the 5th day of April, A. D. 1904, the following order was entered upon the records of this court:

|                                   |                          |
|-----------------------------------|--------------------------|
| CHARLES DUNCAN GURNEY, Appellant, | } 4445. Appeal from Dis- |
| <i>vs.</i>                        |                          |
| F. C. BROWN, Appellee.            | } County.                |

Now comes Joseph C. Helm, Esq., attorney for appellant, and there being no appearance on behalf of the appellee herein, this cause is argued orally and submitted to the consideration and judgment of the court.

## 124 In the Supreme Court of the State of Colorado.

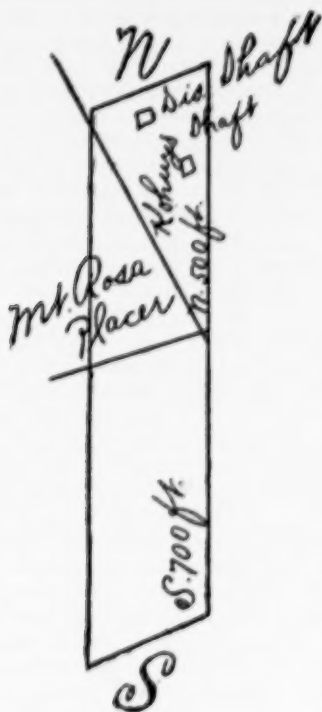
Pleas before the honorable the supreme court of the State of Colorado, sitting at Denver, in said State, at a term thereof begun and held at the capitol building, in said city, on the second Monday of April, A. D. 1904, and of the Independence of the United States the one hundred and twenty-eighth.

Present: Hon. William H. Gabbert, chief justice, Hon. Robert W. Steele, Hon. John Campbell, justices. Hon. Nathan C. Miller, attorney general, Hon. Felix A. Richardson, bailiff, and Horace G. Clark, Esq., clerk.

Be it remembered that thereafter and on to-wit: the 6th day of June, A. D. 1904, the following judgment was entered of record in this court:



in controversy become subject to location? The following diagram will aid in understanding this question:



127 The facts presenting it are as follows:

From this diagram it will be observed that the Kohnyo was segregated into two disconnected tracts by the Mt. Rosa, a patented placer claim. The north end of the Kohnyo, approximately 500 feet in length, embraced the discovery shaft. The south end was some 700 feet in length, and was without development work of any kind. The local land office permitted the claimant of the Kohnyo to enter the two tracts as one claim, but the Land Department ultimately refused to issue a patent for such tracts, basing such refusal upon the ground that two disconnected portions of a lode mining claim separated by a patented placer could not be included under one location, within the same patent. The land office, however, gave the applicant the privilege of proceeding to patent upon either of the segregated tracts, and directed that in default of an election or appeal by the claimant within sixty days from the date of the order, that the entry of that portion

of the claim lying south of the Mt. Rosa placer should be cancelled without further notice. This decision was rendered May 28th, 1895. No appeal was taken from this decision, but the claimant of the Kohnyo instituted proceedings against the claimant of the Mt. Rosa placer the purpose of which was to secure title to the vein of the Kohnyo, which, it was claimed, passed through the portion of the placer conflicting with the Kohnyo location. These proceedings were prosecuted before the Land Department, with the result that on May 7, 1898, a decision was rendered against the Kohnyo claimant's contention of a known vein in the placer conflict. June 14, 1898, the claimant of the Kohnyo filed in the local land office a written instrument, whereby election was made to retain and patent the north end of the Kohnyo claim, and in which the right to further question or review the decision of the Land Department of May 7, 1898, was waived. July 15, 1898, the Commissioner of the General Land Office cancelled the entry of the Kohnyo claim as to that portion south of the Mt. Rosa placer. May 13, 1898, appellee Brown located this 700 feet as the Scorpion Lode claim. June 23, 1898, appellant Gurney located the same premises as the Hobson's Choice lode, and July 16, 1898, appellant Small located the same ground as the P. G. Lode claim. July 15th and 16th, 1898, the claimant of the Scorpion filed amended and second amended location certificates. On these facts judgment was rendered for defendant in each case, from which the plaintiffs appeal.

Other facts were stipulated, which have not been summarized because they are of that character, and cover such questions, that the rights of the respective claimants to the premises in controversy are wholly dependent upon the legal conclusions deducible from those stated. Counsel for appellee, however, contend that the judgment must be affirmed because the agreed facts fail to identify the premises in dispute as part of the Kohnyo claim; do not establish the validity of that location, nor affirmatively show that the premises, when located as the Scorpion, were not part of the unappropriated public domain. The agreed statement will not bear this construction. It is evident from the record and the briefs of counsel, that the only question submitted for trial and the only one which the parties intended to litigate and have determined by the trial court was the time when the premises in controversy reverted to the public domain, and the judgment respecting their rights which would follow the conclusion of law on this question. Or, in other words, the only question really submitted for trial was the point of time at which the premises in controversy were open to location. Upon the determination of this question, the decision as to which of the respective locations was valid, depended. This is apparent from the agreed statement of facts, for thereby it was conceded that each of the parties litigant had complied with all the requirements of the law in the location of their respective claims, as set forth in their respective pleadings, saving and excepting it was not admitted that at the time of the respective locations the ground in controversy was

subject to location. As to each claim this question was reserved for the decision of the trial court by the following provision: "Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain."

130 Counsel for appellee concede that the tract in controversy is substantially identical with the south tract of the Kohnyo lode, but say that such fact is not disclosed by the record. If not, it is rather strange that in the preparation of the agreed statement the various steps affecting the Kohnyo location were set out with such particularity. A discussion of the main question in the cases will demonstrate that the stipulated facts do establish the validity of the Kohnyo location, and that at the date of the location of the Scorpion the premises therein included were not a part of the unappropriated public domain. Appellee, however, is estopped from raising any of these questions now. His counsel state in their brief:

"Upon the trial in the court below the stipulation of facts was not read by either party. \* \* \* It was upon taking up the record before this court for the preparation of appellee's brief that the question of the relevancy of the exhibits attached to the stipulation of facts first presented itself, \* \* \*. From an examination of the record it would appear to be a certainty that the case was tried in the lower court upon assumptions which are wholly unsupported by the written evidence contained in the agreed statement of facts. \* \* \* The truth of the matter is, that after the preparation, execution and filing of the agreed facts, the stipulation containing such facts was never again read or digested by any of the parties in interest. The trial court and counsel for all the parties litigant assumed that the stipulation covered facts which, upon investigation, we fail to find."

131 Facts assumed to be true on the trial of a cause cannot afterwards be contested on appeal—2 Cyc., 675. In short, it appears that counsel for both sides, on the trial of the cause, construed the stipulated facts as covering these questions, and on appeal they will be held to that construction. Again, none of these questions were raised in the court below. Had they been, and the attention of the court and counsel been called to the fact that the agreed statement omitted material facts, opportunity would have been afforded to correct the alleged omissions either by further stipulation or testimony. One of the cardinal principles of appellate procedure is, that questions sought to be reviewed shall first be brought before the trial court for decision. Otherwise a court of review would often be compelled to decide purely original questions which the trial court was given no opportunity to decide or determine—Elliott's Appellate Procedure, § 489.

We shall next notice the contention of counsel for appellee, that the premises in controversy were not segregated by the Kohnyo location. In support of this claim, two propositions are relied upon:

(1) The decision of the Land Department of May 7, 1898, to the effect that the Kohnyo vein was not known to exist within the boundaries of the Mt. Rosa placer at the time application for the patent therefor was made; and (2) that the rights of the Kohnyo claimant terminated at the point where the north end of the Kohnyo claim intersected the exterior boundaries of the Mt. Rosa placer. The first proposition is clearly untenable. The proceedings before the Land Department with respect to the Kohnyo vein passing through the conflicting patented placer were for the purpose of determining whether or not such vein was known to exist at the time patent for the placer was applied for. On the evidence submitted the department held that it was not known when the claimants of the Mt. Rosa applied for a patent, and therefore could not be held by the Kohnyo lode. This is radically different from a judgment to the effect that the vein did not pass through the conflicting placer location. The second proposition is equally untenable. The Land Department is a special tribunal created for the purpose of supervising the various proceedings whereby title from the Government to portions of the public domain may be obtained. Its judgment respecting those matters which it must determine in ascertaining whether or not an applicant is entitled to acquire the fee title or patent from the United States is unassailable, except by direct proceedings. In other words, its judgment respecting these matters cannot be attacked collaterally.

*Steele v. Smelting Co.*, 106 U. S., 447;

*Smelting Co. v. Kemp*, 104 U. S., 633.

In this instance the Land Department had determined that the applicant for patent on the Kohnyo was entitled to a conveyance of one or the other of the two tracts. Whether or not this conclusion was right or wrong cannot be questioned collaterally. If wrong, it was an error which the Land Department committed in the exercise of its jurisdiction over those matters specially entrusted to its supervision and control, and hence, could only be corrected in a direct proceeding instituted for that purpose.

133 This brings us to a discussion and determination of what we have designated as the main question, namely: At what date, with respect to the three locations now asserting rights to the premises in dispute, did such premises become subject to location?

No case is cited by counsel where the propositions presented by the facts narrated and bearing upon this question have been determined, and we must, therefore, analyze the facts and their effect, for the purpose of ascertaining when, according to these facts, the subject matter of the actions reverted to the public domain. This is the important point, because a location of a mining claim can only be made upon unappropriated mineral land—*Armstrong v. Lower*, 6 Colo., 393. The decision of May 28, 1895, did not cancel the entry made by the applicant for patent on the Kohnyo. Thereby the Kohnyo claimant was given the right to elect which of the two tracts

would be selected for patent. In case of failure to make such election, the Government reserved the right to cancel the entry on the south tract. The judgment of the Land Department was to be enforced in one of two ways, whereby one or the other of the tracts would be restored to the public domain, namely: by the election of the Kohuyo claimant, or the affirmative action of the department.

The proceedings instituted by the Kohuyo claimant for the purpose of establishing the existence of a known vein through the Mt. Rosa placer at the time the patent for the latter was applied for cut no figure, for, independent of these proceedings, the fact remains that the judgment of the Land Department of May 28, 1895, was

134 not enforced or given effect until the Kohuyo claimant, by its written declaration filed in the local land office indicated its intention to proceed to patent on the north tract. This act on the part of the Kohuyo claimant was an express surrender of all rights to the south tract. It operated as an abandonment of any right thereto, and took effect the very moment the declaration of election was filed in the local land office—*Derry v. Ross*, 5 Colo., 295. Up to that time the Land Department, having taken no affirmative action to cancel the Kohuyo entry on the south tract, the claimant might have selected that instead of the north one. Certainly, had such election been made, it could not be successfully claimed on the record before us, that the Scorpion could have established any rights against such selection. This conclusion is inevitable, because, so long as the Kohuyo claimant had rights in the south tract, it was not subject to location by third parties. If, then, this tract could not be located as against the rights of the Kohuyo claimant, an attempted location during the existence of such rights could be of no force or effect, because made at a time when it was not subject to location. The subsequent formal cancellation of the entry on the south tract by the action of the Land Department could add nothing to that which had already taken place by the action of the Kohuyo claimant in surrendering and abandoning all rights to the south tract. Such action on the part of the department only evidenced in another form the fact that the Kohuyo claimant had surrendered title to this tract so far as evidenced by the receiver's receipt, and that all rights

135 thereunder were formally cancelled so far as the Government was concerned. This action, however, was not necessary in order to restore the south tract to the public domain, because, by the judgment of the Land Department, that occurred the moment the Kohuyo claimant complied with that judgment. The action of the department in formally cancelling the entry of the south tract of the Kohuyo claim is only important in view of the fact that counsel for appellee contend that the judgment of May 28, 1895, was self-executing, and that it did not appear from the agreed statement that the Kohuyo entry had not been cancelled in accordance with that judgment (or another, which we have not noticed because we do not deem it material) at the time of the Scorpion location. The Land Department certainly did not treat the judgment of May 28, 1895,

as self-executing, because the Commissioner expressly stated, under date of July 15, 1898, that "it now devolves upon this office to execute the same." This action also establishes the fact that so far as any affirmative act of the Government was concerned, the south tract of the Kohnyo entry was not cancelled until the last mentioned date. It is therefore apparent that the contention of counsel for appellee, that the statement of facts does not establish the validity of the Kohnyo location, nor affirmatively show that on the date of the Scorpion location the premises so claimed were not subject to location, is not tenable, because the premises did not revert to the public domain until the Kohnyo claimant filed its election in the local land office, and up to that time the entry of the south tract of the Kohnyo had not been vacated by any affirmative act on 136 the part of the Land Department. We must, therefore, conclude that the premises in controversy were not subject to location until after the date when the Kohnyo claimant filed in the local land office its election to patent the north tract. This being the conclusion, a brief summary of the facts will indicate which of the three claims constitutes a valid location of the south tract. The election of the Kohnyo claimant was filed in the local land office June 14, 1898. The Scorpion was attempted to be located May 13, 1898. June 23, 1898, the Hobson's Choice lode was located, and July 16th following the P. G. was located. It thus appears that the Scorpion was attempted to be located at a time when the premises were not subject to location; that the Hobson's Choice lode was located when they had reverted to the public domain, and that the location of the P. G. was made after that date; so that the only valid location was the Hobson's Choice.

Counsel for appellee have argued that the suspension of a receiver's receipt operates to render it incompetent as evidence of the validity of the claim upon which it is issued. This proposition may be correct, but the facts do not justify its application. The certificate on the Kohnyo was not suspended or cancelled, but the order of the department was to the effect that the entry itself should be suspended until certain directions were complied with. The mere suspension of a mineral entry for the purpose of requiring compliance with departmental regulations 137 does not destroy the force of the certificates evidencing such entry, or enable third parties to attack its validity—§ 772, 2 Lindley on Mines; *Last Chance M. Co. v. Tyler M. Co.*, 61 Fed., 557. Counsel for appellee, as we understand their brief, have also advanced the proposition that the judgment of the Land Department of May 28, 1895, not having been appealed from, operated to cancel the entry at the expiration of the date when the time allowed for appeal expired. We think this contention has already been answered, but the authorities they cite to support their claim are not in point. In *U. S. v. Steenerson*, 50 Fed., 504, as well as in *Murray v. Polglase*, 43-Pac. (Mon.), 505, it was held that according to the judgment of the Land Department, the respective entries had

been cancelled ; and so in the cases of Reed, 6 L. D., 563, Gauger, 10 L. D., 221, and Perrott v. Connick, 13 L. D., 598. As we have already shown, a judgment of absolute cancellation is entirely different from one where the entry is merely suspended for the purpose of enabling the applicant to comply with some specific requirement.

But one further matter requires notice, namely : The filing on the part of the Scorpion claimant of amended and second amended location certificates July 15 and 16, 1898, or, as it is claimed on behalf of his counsel, he made amended locations of his claim on these dates. These acts in no manner changed or enlarged his rights, for prior thereto, the premises had been claimed and located as the Hobson's Choice, at a time when the premises thereby included were open to location.

138 As those cases were tried in the court below on an agreed statement of facts, which definitely determines the rights of the respective parties, judgments in each case will be directed here under the authority of § 398 of the Civil Code. The judgment in Small v. Brown is vacated, and judgment will be entered in this court that neither party has established any right to the premises in controversy, and that each pay his own costs in this court as well as in the court below. In Gurney v. Brown it appears from the facts stipulated (considering those not specially noticed in the opinion), that the location of the Hobson's Choice is in all respects regular ; that appellant Gurney is the owner of, and has established his right to the possession and occupancy of the premises embraced in, such location, and is entitled to recover the same from the appellee by virtue of a full compliance with the statutes of the United States and the State of Colorado in the discovery and location of the Hobson's Choice Lode miningclaim. Wherefore, judgment is now here directed to be entered in this court that he do recover the premises included in the Hobson's Choice location of and from the appellee Brown, and that he also recover his costs in this court, as well as in the court below.

Judgments vacated and judgments entered in this court.

Endorsed : Filed in supreme court Jun- 6 1904. Horace G. Clark, clerk.

139 Be it remembered, that afterwards and on to-wit : the 20th day of June, A. D. 1904, the following order was entered of record in this office.

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|-----------------------------------|--|
| CHARLES DUNCAN GURNEY, Appellant, | } 4445. Appeal from the<br>District Court of Teller<br>County. |
| vs.<br>F. C. BROWN, Appellee.     |  |

At this day, upon consideration thereof, it is ordered by the court, that the motion of appellee herein, to extend the time for filing his petition for rehearing herein to June 23rd, 1904, be, and the same is hereby allowed.

140 In the Supreme Court of the State of Colorado.

|                                   |                                     |
|-----------------------------------|-------------------------------------|
| CHARLES DUNCAN GURNEY, Appellant, | } No. 4445. Petition for Rehearing. |
| <i>vs.</i>                        |                                     |
| F. C. BROWN, Appellee.            | }                                   |

Now comes the above named appellee, F. C. Brown, who prays the honorable court to grant a rehearing in this cause on the following grounds, to-wit:

First. This court erred in holding "that the rights of the Kohnyo claimant did not terminate at the point where the north end of the Kohnyo claimant intersected the exterior boundaries of Mt. Rosa placer claim," because,

(a.) On May 28th the Commissioner of the General Land Office rendered his decision, declaring expressly as follows: "The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts."

(b.) Because, there is no provision of law, giving to lode claimant the right to include ground not contiguous to that containing its discovery, where the tract is intersected and cut in two by a patented placer claim

(c.) Because, no discovery of mineral was ever made or attempted to be made by the Kohnyo claimant-upon any part of their location, except the northerly tract, containing the original  
141 discovery and the premises in controversy in this suit were never segregated by the Kohnyo location.

Second. The court erred in holding that upon the record in this case, the Kohnyo claimant was entitled to a conveyance of the southerly tract which was separated from the discovery by the Mt. Rosa placer, because,

(a.) The Commissioner of the General Land Office, in his judgment of May 28th, 1895, after declaring that the right to the Kohnyo lode terminated where it intersected the placer and was, therefore, confined to the northerly tract, imposed conditions amounting to a condition precedent, the fulfillment of which, within a stated period, would allow the claimant the right to select the southerly tract and patent same. The Commissioner says:

"The claimant company may, however, elect which of said tracts it desires to retain, the five hundred feet on the north or the southerly seven hundred feet. If the latter tract is retained, evidence of discovery of mineral thereon and the statutory expenditure of five hundred dollars (\$500.00) must be submitted. Claimant will be allowed sixty (60) days in which to furnish required evidence or to appeal in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice from this office."

(b.) The fact that the Kohnyo claimant was allowed the privilege

of complying with the mining laws with respect to the southerly tract and of furnishing evidence within sixty (60) days of the  
142 discovery of mineral thereon, and of the statutory expenditure of the five hundred dollars (\$500.00) to secure patent, did not give to said claimant any rights in said tract of land, nor reduce the southerly tract to the condition of occupied mineral land, it having been expressly decided, that the Kohnyo claimant had no rights whatever in that piece of ground and could have none until the conditions prescribed were strictly complied with.

(c.) The holding of this court makes the mere privilege of initiating right to possession through the compliance with the mining laws, tantamount to the ownership of the actual right itself.

(d.) The holding of this court establishes that the Kohnyo claimant was entitled to a right to the southern tract and the right to patent same without, in any way, complying with the mining laws and without taking due and proper steps to comply with the judgment of the Land Office, expressly reciting the conditions upon which any rights could be secured.

Third. The court erred in holding that the decision of the Commissioner of the General Land Office, under date of May 28th, 1895, had not become operative at the time of the Scorpion location, because,

(a.) Said decision provided "claimant will be allowed sixty (60) days in which to furnish the required evidence or to appeal in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer  
143 claim, without further notice from this office." And, because, it is an admitted fact that the foregoing requirements in said decision were never complied with within the time specified, or at all.

(b.) The Kohnyo claimant could not comply with the conditions required by said decision, except in the specified manner stated, therefore, no rights of the Kohnyo claimant in or to said southerly tract, could arise out of the mere act of selection of said tract, regardless of the intervening time and the actions of others, but could only arise by a due appropriation of said tract in the discovery of mineral thereupon, as required by the mining laws and by due compliance with the terms of the decision in furnishing, within sixty (60) days, the necessary evidence required.

(c.) Because, a judgment rendered, as in this case, by the Land Department, holding an entry for cancellation, becomes operative from the time rendered, and the ground subject to location by another.

(d.) Because, the original judgment of the Land Office, under date of May 28th, 1895, has never been changed or qualified in any manner. The Kohnyo claimant did not, within the sixty (60) days, allowed by the judgment, or at any other time, furnish the required evidence of discovery of mineral or five hundred (\$500.00) dollars improvements on the southerly tract and never made selection of any

ground except that which the judgment of May 28th, 1895, said they were entitled to.

(e.) Because, no selection having been made within the sixty (60) days, and no evidence having been furnished as required, the Kohnyo claimants lost whatever rights (if any) they ever had, in the southerly tract, by operation of law.

144 Fourth. The court erred in holding that the written declaration of the Kohnyo claimant, filed in some other proceeding, in which, said claimant states that it "waives the right of review of the last named decision and elects to retain in said M. E. No. 573, that portion of the Kohnyo lode claim which is described in the above mentioned letter of the Commissioner as the 'five hundred (500) feet on the north,'" was an express surrender of all rights of said claimant to the south tract and operated as an abandonment of any right thereto and took effect the very moment the declaration was filed in the local land office, because,

(a.) At the time said instrument was filed, the Kohnyo claimant had no rights in said south tract, for the reason that they had never complied with the judgment of the Land Department and had never furnished the required evidence of the performance of the conditions precedent, stated in said judgment.

(b.) Because, said so called selection was simply an acquiescence in the judgment of May 28th, 1895, declaring that "the right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim."

(c.) Because, until mineral had been discovered on said southerly tract, the Kohnyo claimant had no rights therein which could be surrendered or abandoned.

(d.) Because, no affirmative action aside from the judgment of May 28th, 1895, of the Land Department, was necessary to cancel the Kohnyo entry on the south tract and no self serving act of the  
145 claimant in deciding to patent the tract of ground containing his discovery shaft, could have the effect of restoring to the public domain, land in which he had no right or title.

Fifth. The court erred in holding that the Kohnyo claimant had any right whatsoever in the southerly tract at the time of the Scorpion location, because,

(a.) Under the departmental decision of May 28th, 1895, it had been expressly established as the law, that the Kohnyo claimant had no right to grounds beyond the boundaries of the intersected Mt. Rosa placer claim, and, having no right to said ground at the date mentioned, the Kohnyo claimant could have none when the Scorpion lode was located, all conditions remaining the same at that date.

(b.) Because, no right whatsoever in said southerly tract, could ever be acquired by the Kohnyo claimant, except by the discovery of mineral thereupon as required by the mining laws.

(c.) Because, said claimant had wholly failed and refused to comply with the judgment of the Land Department, in allowing him to select said southerly tract within sixty (60) days' time, after May

28th, 1895, by making such discovery of mineral and doing the five hundred (\$500.00) dollars' necessary patent work, and furnishing the required evidence of these facts, and only by complying with such conditions, could the Kohnyo claimant ever establish any right in said southerly tract.

Sixth. The court erred in holding that the southerly tract was only restored to the public domain by action of the Kohnyo claimant, in deciding to patent the northerly tract, which contained the original discovery, because,

146 (a.) Under the holding of the Commissioner of the General Land Office, before referred to, the Kohnyo claimant had no right, at any time, to the southerly tract.

(b.) After the judgment of May 28th, 1895, the southerly tract was, up to the time of the location of the Scorpion claim, unappropriated mineral land, and, upon the location of the Scorpion claim, was duly segregated.

(c.) Because, at the time the Kohnyo claimant made and filed his statement accepting the decision of the Land Department, which declared he had no right to the southerly tract, the ground in controversy had been duly located and appropriated by the Scorpion lode.

(d.) Because, the mere acquiescence upon the part of the claimant, in the judgment of the Land Department, and no attempt upon his part to ever acquire the title to the southerly tract, does not operate as a restoration to the public domain of that to which the claimant never had any right or title.

Seventh. The court erred in holding that the judgment of the Commissioner of the General Land Office, under date of May 28th, 1895, did not amount to a cancellation, because,

(a.) The holding for cancellation is in law an equivalent of absolute cancellation.

(b.) The time within which the judgment was, by its terms, to be complied with, in the event claimant desired to secure title to the southerly tract, fully elapsed without such compliance being made or an appeal taken.

147 (c.) Because, no stay or supersedeas was had in reference to said departmental decision lengthening or extending the time in which the conditions mentioned were to be complied with.

(d.) Because, claimant had the right of appeal to the Secretary of the Interior, which right was absolutely waived.

Eighth. The court erred in holding that the order of the department, of May 28th, 1895, was to the effect that the entry, itself, should be suspended until certain directions were complied with, because,

(a.) It appears from such order or decision of the department, that the entry was not suspended, but cancelled to the extent of the southerly tract, without further notice, provided the claimant did not appeal or furnish the required evidence within sixty (60) days.

(b.) Because, such order or decision of the department was not

made for the purpose of requiring the compliance upon the part of the claimant with certain departmental regulations, but on the contrary, absolutely fixed and determined the rights of the claimant and gave him the usual time in which to appeal from the decision to the Secretary of the Interior.

Ninth. For the reasons above set forth and others which will appear in the argument and brief accompanying this petition, the court erred in holding that the ground in controversy was not subject to location at the time the appellee located his Scorpion lode.

148 Wherefore, because of the facts set forth herein and, because the decision of your honors, rendered in this case, completely wipes out and destroys what appellee believes to be valuable property rights, to which he is entitled, this petition is respectfully submitted, with the prayer that a rehearing be granted in this case.

CHARLES F. POTTER,

Attorney for F. C. Brown, Appellee.

149 Endorsed: No. 4445. In the supreme court of the State of Colorado. Charles Duncan Gurney, appellant, v. F. C. Brown, appellee. Petition for rehearing. Filed in supreme court Jun- 23 1904. Horace G. Clark, clerk. Charles F. Potter, attorney, 302 Boston building, Denver, Colo.

150 And afterwards and on to-wit: the 27th day of June, A. D. 1904, the following order was entered of record in this office:

|                                   |                                    |
|-----------------------------------|------------------------------------|
| CHARLES DUNCAN GURNEY, Appellant, | } 4445. Appeal from the            |
| vs.                               |                                    |
| F. C. BROWN, Appellee.            | } District Court of Teller County. |

At this day, upon consideration thereof, it is ordered by the court, that the petition of appellee for a rehearing herein be, and the same is hereby denied.

151 I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original transcript of record, bill of exceptions, assignment of errors, opinion of this court, petition for rehearing, and all orders of court entered herein, as the same now remain on file and of record in this office.

Witness my hand and seal of said court, affixed at my office, in the city of Denver, this 12th day of Aug., A. D. 1904.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK, Clerk,  
By JOHN B. COOKE, Deputy.

152

In the Supreme Court of the United States.

|   |   |
|---|---|
| FRANK COLE BROWN, Heretofore Designated as F. C. Brown, Plaintiff in Error, | } No. —. Error to the Supreme Court of the State of Colorado. |
| vs.   |   |
| CHARLES DUNCAN GURNEY, Defendant in Error.                                  | }   |

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the supreme court of the State of Colorado erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to-wit:—

(1.) The said supreme court erred in over-ruling and setting aside the judgment of the trial court, because, under the agreed statement of facts, and the laws of the United States relating to the control and disposition of its public mineral lands by the Department of the Interior, plaintiff in error was entitled to his judgment.

(2.) The said supreme court erred in directing judgment to be entered in said court against plaintiff in error and in favor of defendant in error, because, under the agreed statement of facts, and the laws of the United States relating to the control and disposition of the public mineral lands by the Department of the Interior, the defendant in error was not, and is not, entitled to judgment against the plaintiff in error, or to recover the premises in controversy.

(3.) The said supreme court erred in not giving due force and effect to the decision of the Land Department of the Government of the United States, to wit:—the decision of the Commissioner of the General Land Office, dated May 28, 1895, which expressly declared that the right to the lode terminated where it intersected and passed within the exterior boundaries of the patented placer claim, which placer claim divided the lode claim into two separate and distinct tracts.

(4.) The said supreme court erred in construing and determining the decision of the Land Department of the Government of the United States, to-wit:—the decision of May 28, 1895, and the statutes and laws of the United States relating to the sale and disposition of its mineral lands by the said Land Department, in such a manner as to hold that the southerly seven hundred (700) feet of the lode location in question, was a part of the Kohnyo claim, until June 14, 1898, and that the judgment of cancellation of May 28, 1895, did not become operative prior to June 14, 1898, and that such judgment of cancellation was not conclusive and binding upon the supreme court of Colorado.

(5.) The said supreme court erred in holding that under the decision of the General Land Office of date, May 28, 1895, and the statutes and laws of the United States relating to the sale and dis-

position of its mineral lands, the lode claimant ever had or could have any right, title or interest in the southerly seven hundred (700) feet of the Kohnyo claim, or right to enter same for patent, without first making a discovery of mineral thereupon, and making proof of such discovery to the Land Department, together with proof of the statutory expenditure of five hundred (\$500.00) dollars for the purpose of obtaining patent.

(6.) The said supreme court erred in holding that, upon the record in this case, the Kohnyo claimant was entitled to a conveyance of the said southerly tract, or to enter same in the United States Land Office for patent.

(7.) The said supreme court erred in not holding that under the judgment of the Land Department of May 28, 1895, the interest of the claimant in the said southerly tract—the premises in controversy in this suit—depended entirely upon the performance of conditions precedent, to-wit:—the discovery of mineral and the performance of five hundred (\$500.00) dollars patent labor, and the failure to perform the conditions within the stated time, lost to claimant the right of selection mentioned in such judgment.

(8.) The said supreme court erred in not giving due and proper effect and consideration to the decision of the Department of the Interior, of May 28, 1895, which held that a lode claim, intersected by a patented placer, cannot be allowed to include ground, not contiguous to that containing the discovery, and that the right to the lode claim in question, terminated where it intersected and passed within the exterior boundaries of the patented placer claim; and erred, in not holding that such judgment and decision was binding upon the supreme court of Colorado.

(9.) The said supreme court erred in holding that the judgment of the Land Department, of May 28, 1895, was without force or effect until the Kohnyo claimant, by its written declaration, filed in the local land office, indicated its intention to patent the *north tract*, which had always been recognized as valid and which contained the discovery workings of the claim.

(10.) The said supreme court erred, in holding that the act on the part of the Kohnyo claimant in filing the written declaration known as "Exhibit H" in the Land Office, was in and by itself alone, the means of determining—under the judgment of the Land Department of May 28, 1895—when the ground in controversy in this suit became public domain. And in holding that the rights of the parties to this litigation must be determined solely by the act of filing said written declaration of June 14, 1898, and not by the judgment of the Land Department.

155 (11.) The said supreme court erred in holding that under the statutes and laws governing the sale and disposition of the public mineral domain, and the control and power of the Department of the Interior over same, the judgment of the Land Department of May 28, 1895, was not, and could not be the means

of cancelling the Kohnyo entry upon the premises in controversy, until the said Kohnyo claimant filed in the local land office the instrument known as "Exhibit H;" and in virtually holding that said judgment was without force or effect until more than three years after it was rendered.

(12.) The said supreme court erred in holding that the premises in controversy in this suit, did not revert to the public domain, and was not a part of the public domain until June 14, 1898, when the Kohnyo claimant filed "Exhibit H" in the local land office.

(13.) The said supreme court erred in holding that the said decision of the Land Department, of May 28, 1895, was not a judgment of cancellation, as to the premises in controversy in this suit.

(14.) The said supreme court erred in holding that the judgment of May 28, 1895 of the Land Department of the Government did not—as to the premises in controversy in this suit—become final sixty (60) days after same was rendered, and thereupon, become conclusive and binding upon the Kohnyo claimant and upon the courts.

(15.) The said supreme court erred in holding that the judgment of the Land Department of May 28, 1895, which allowed the claimant sixty (60) days in which to furnish the required evidence, or to appeal—in default of which, the entry would be cancelled to the extent of the premises in controversy—did not become a final judgment upon the failure of the claimant to either appeal or furnish the evidence required; and in holding that, under the said judgment, the land did not—at the end of said sixty (60) days' time (there being no appeal or proofs furnished)—become subject to location and entry by the first legal applicant.

(16.) The said supreme court erred in holding, that under the statutes and laws of the United States relating to its mineral lands, and the control, sale and disposition of same by the Department of the Interior, the premises in controversy *was* not public mineral domain, and subject to location by plaintiff in error, on May 13, 1898, when he located his Scorpion Lode claim.

(17.) The said supreme court erred in not affirming the judgment of the trial court, giving to plaintiff in error, his rights under the statutes and laws of the United States, as the first legal locator and applicant for the mineral premises in controversy.

Wherefore, for these and other manifest errors which appear in the record in this case, said Frank Cole Brown, plaintiff in error, prays that the judgment of the said supreme court of Colorado be reversed and set aside, and held for naught, and that the judgment of the trial court be affirmed and reinstated, giving and granting to the plaintiff in error, his rights under the statutes and laws of the United States; plaintiff in error, also prays judgment for his costs.

CHARLES F. CONSAUL,

Bond Building, Washington, D. C.,

CHARLES F. POTTER,

302 Boston Building, Denver, Colo.,

Attorneys for Frank Cole Brown, Plaintiff in Error

156½ [Endorsed:] No. —. In the Supreme Court of the United States. Frank Cole Brown, heretofore designated as F. C. Brown, plaintiff in error, vs. Charles Duncan Gurney, defendant in error. Assignments of error. Filed in supreme court, Aug. 5 1904 Horace G. Clark clerk.

157 In the Supreme Court of the State of Colorado.

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| CHARLES DUNCAN GURNEY, Appellant,    | } No. 4445. Petition for<br>Writ of Error. |
| <i>vs.</i><br>F. C. BROWN, Appellee. |  |

Comes now the above named F. C. Brown, appellee, and says; That on the 6th day of June, A. D. 1904, judgment in this case was entered by this court in favor of Charles Duncan Gurney, appellant, and against F. C. Brown, appellee, and thereafter, a petition for rehearing was filed, presented, considered, and on the 27th day of June, A. D. 1904, denied by the court, whereupon said judgment became final; that said F. C. Brown was, and is aggrieved in, that, in said judgment and the proceedings had prior thereto in this case, certain errors were committed to his prejudice; that this is an action brought under the statutes of the United States, relating to the mineral lands of the United States, and the control of same by the Department of the Interior, and the sale and patenting of same to citizens of the United States, and under and by virtue of said statutes, the said F. C. Brown claims title to and the right to patent certain mineral lands in the State of Colorado, and that by this action, there was drawn in question, the construction of certain of said statutes and the decision of this court is against said title and right claimed by the said F. C. Brown, appellee, and, as he believes, contrary to the statutes of the United States, relating to the sale and disposition of its mineral lands and against the title and right of said F. C. Brown, thereunder, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said F. C. Brown prays that a writ of error may issue to the supreme court of the State of Colorado for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein, may be sent to the United States Supreme Court.

CHARLES F. CONSAUL,  
CHARLES F. POTTER,  
Attorneys for F. C. Brown.

158 In the Supreme Court of the State of Colorado.

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| CHARLES DUNCAN GURNEY, Appellant,    | } No. 4445. Allowance of<br>Writ of Error. |
| <i>vs.</i><br>F. C. BROWN, Appellee. |  |

Comes now F. C. Brown, the appellee above named, on this 5th day of July, A. D. 1904, and files and presents to this court, his petition, praying for the allowance of a writ of error intended to be urged by him; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed, provided, however, that said F. C. Brown, appellee, give bond according to law in the sum of two thousand (2000) dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 5th day of July, A. D. 1904.

WILLIAM H. GABBERT,  
Chief Justice of the Supreme Court  
of the State of Colorado.

158½ [Endorsed:] No. 4445. In the supreme court of the State of Colorado. Charles Duncan Gurney, appellant, *vs.* F. C. Brown, appellee. Petition for writ of error and allowance of same. Filed in supreme court, Jul-6, 1904. Horace G. Clark, clerk. Charles F. Potter, attorney, 302 Boston building, Denver, Colo.

159 In the Supreme Court of the United States.

|   |  |
|---|--|
| FRANK COLE BROWN, Heretofore Designated as F. C. Brown, Plaintiff in Error, | } Bond for Security upon<br>Writ of Error. |
| <i>vs.</i><br>CHARLES DUNCAN GURNEY, Defendant in Error.                    |  |

Know all men by these presents, that we, Frank Cole Brown, of the county of Pueblo, State of Colorado, as principal, and Kate M. Woods, Harry Edwin Woods and Roselpha Green, of the county of El Paso, State of Colorado, as sureties, are held and firmly bound unto the above named Charles Duncan Gurney in the sum of two thousand (\$2000.00) dollars, to be paid to the said Charles Duncan

Gurney, and for the payment of which well and truly to be made, we bind ourselves and each of us, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the thirtieth day of July, in the year of our Lord, one thousand nine hundred and four.

Whereas, the above named Frank Cole Brown, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the supreme court of the State of Colorado.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise, to remain in full force and virtue.

|                    |         |
|--------------------|---------|
| F. C. BROWN.       | [SEAL.] |
| FRANK COLE BROWN.  | [SEAL.] |
| ROSELPHIA GREEN.   | [SEAL.] |
| KATE M. WOODS.     | [SEAL.] |
| HARRY EDWIN WOODS. | [SEAL.] |

STATE OF COLORADO, } ss:  
County of El Paso, }

Harry Edwin Woods, whose name is subscribed as surety to the above bond, being first duly sworn, says, that he is a resident and freeholder of the State of Colorado, and is worth more than the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property not exempt by law from execution in this State.

HARRY EDWIN WOODS.

Subscribed and sworn to before me, this 2nd day of August, A. D. 1904.

My commission expires Oct. 11, 1907.

[SEAL.]

LINUS E. SHERMAN,  
Notary Public.

161 STATE OF COLORADO, } ss:  
County of El Paso, }

Kate M. Woods and Roselphia Green, whose names are subscribed as surety to the above bond, being severally and duly sworn, each for herself says, that she is a resident and freeholder of the State of Colorado, and is worth more than the sum in said bond specified as the penalty thereof, over and above all her just debts and liabilities in property not by law exempt from execution in this State.

ROSELPHIA GREEN.  
KATE M. WOODS.

Subscribed and sworn to before me, this thirtieth day of July,  
A. D. 1904.

My commission expires December 31, 1906.

MARY L. RICHARDSON,  
Notary Public.

This bond approved this fourth day of August, A. D. 1904.

WILLIAM H. GABBERT,  
Chief Justice of the Supreme Court  
of the State of Colorado.

Endorsed: No. — In the Supreme Court of the United States.  
Frank Cole Brown, heretofore designated as F. C. Brown, plaintiff  
in error, vs. Charles Duncan Gurney, defendant in error. Bond.  
Filed in supreme court Aug. 5 1904. Horace G. Clark, clerk.

162 The original of the foregoing supersedeas bond was lodged  
with the clerk of the supreme court of the State of Colorado  
on the fifth day of August, A. D. 1904, and the following indorse-  
ment made thereon:

Bond. Filed, August 5, 1904. Horace G. Clark, clerk supreme  
court.

163 Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the justices of  
the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of  
the judgment of a plea which is in the said supreme court of the  
State of Colorado, before you, at the June sitting of the April term  
1904 thereof, being the highest court of law or equity of the said  
State, in which a decision could be had in the said suit between  
Charles Duncan Gurney plaintiff and appellant, and Frank Cole  
Brown designated as F. C. Brown defendant and appellee, wherein  
was drawn in question the validity of a treaty or statute of, or an  
authority exercised under, said State, on the ground of their being  
repugnant to the Constitution, treaties, or laws of the United States,  
and the decision was in favor of such their validity; or wherein was  
drawn in question the validity of a treaty or statute of, or an au-  
thority exercised under, the United States, and the decision was  
against their validity; or wherein was drawn in question the con-  
struction of a clause of the Constitution, or of a treaty, or statute  
of, or commission held under the United States, and the decision  
was against the title, right, privilege, or exemption specially set up  
or claimed under such clause of the said Constitution, treaty, stat-

ute, or commission; a manifest error hath happened to the great damage of the said Frank Cole Brown as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of August, in the year of our Lord one thousand nine hundred and four.

Done in the city and county of Denver, with the seal of the circuit court of the United States for the district of Colorado attached.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY,

Clerk of the Circuit Court of the United States,  
District of Colorado.

Allowed by

WILLIAM H. GABBERT,

Chief Justice of the Supreme Court of the  
State of Colorado.

163½ [Endorsed:] No. —. In the Supreme Court of the United States. Frank Cole Brown, plaintiff in error, vs. Charles Duncan Gurney, defendant in error. Writ of error to the supreme court of the State of Colorado. Filed this — day of August, 1904. — — —, clerk supreme court. Filed in supreme court, Aug. 5, 1904. Horace G. Clark, clerk.

164 The original of the foregoing writ of error was lodged with the clerk of the supreme court of the State of Colorado on August fifth, 1904, and also at the same time and place, a copy thereof for the defendant, Charles Duncan Gurney, said copy being addressed personally to said defendant. The following indorsement was made upon the said original writ and upon each copy:

Writ of error. Filed, August 5, 1904. Horace G. Clark, clerk supreme court.

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Citation.

UNITED STATES OF AMERICA, ss :

The President of the United States to Charles Duncan Gurley, Colorado, Greeting :

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Colorado, wherein Frank Cole Brown is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of the State of Colorado, this fifth day of August, 1904.

WILLIAM H. GABBERT,  
Chief Justice of the Supreme Court  
of the State of Colorado.

Attest :

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,  
Clerk of the Supreme Court  
of the State of Colorado.

CITY AND COUNTY OF DENVER, }  
State of Colorado. }

AUGUST 5TH, 1904.

I, the undersigned, Charles Duncan Gurney, the defendant in error of the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

CHARLES DUNCAN GURNEY,  
Defendant in Error.

165½ [Endorsed:] No. — In the Supreme Court of the United States. Frank Cole Brown, plaintiff in error, vs. Charles Duncan Gurney, defendant in error. Citation. Filed this — day of August, 1904. — — —, clerk supreme court. Filed in supreme court, Aug. 13, 1904 Horace G. Clark, clerk.

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Return to Writ.

UNITED STATES OF AMERICA,  
Supreme Court of Colorado, } ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said supreme court, in the city and county of Denver, this 20th day of August, A. D. 1904.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,  
Clerk of the Supreme Court of the State of Colorado,  
By JOHN B. COOKE, Deputy.

Costs of Suit.

Plaintiff's costs, —, paid by Charles Duncan Gurney.

Defendant's costs, —, paid by Frank Cole Brown.

Costs of transcript, \$85.60, paid by Frank Cole Brown.

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Clerk of the Supreme Court of the State of Colorado.

Endorsed on cover: File No. 19,469. Colorado supreme court.  
Term No. 97. Frank Cole Brown, plaintiff in error, *vs.* Charles  
Duncan Gurney. Filed September 5th, 1904. File No. 19,469.